

**Caste Discrimination and the Imperfect Promise of Labor Arbitration:**  
**A Comparative Approach**

**I. Introduction**

India and the United States have comparative strengths and weaknesses in combating caste oppression against workers. India has a much more robust judicial understanding of caste than the United States does, but the United States has a more comprehensive labor law framework and stronger measures to force employer bargaining than India does. Given the current legal terrain in the United States—especially regarding protecting identities hitherto neglected in American courts, such as caste—this Article will argue that labor arbitration law provides a worthwhile avenue for fighting caste discrimination while legislative protections are still being introduced. In particular, developing an industrial common law of the shop at major employers in the tech sector could be valuable as many of which have unionized, like Alphabet, or are in the process of unionizing. These employers could provide influential models for other labor arbitrators in reading a collective bargaining agreement (CBA) with a common anti-discrimination clause that adapts Title VII of the 1964 Civil Rights Act.<sup>1</sup> The tech sector is a key sector for fighting caste discrimination because these employers often have large workforces in

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<sup>1</sup> For the unionization of Alphabet, see Kate Conger, *Hundreds of Google Employees Unionizing, Culminating Years of Activism*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/technology/google-employees-union.html>; for other union drives, see Brian Heater, *Following unionization, Glitch signs collective bargaining agreement*, GLITCH (Mar. 2, 2021), <https://techcrunch.com/2021/03/02/following-unionization-glitch-signs-collective-bargaining-agreement/>; Tyler Falk, *NPR plans to recognize digital staffers' union*, CURRENT (April 28, 2021), <https://current.org/2021/04/npr-plans-to-recognize-digital-staffers-union/>; Q.ai, *A Look Inside This Year's Biggest U.S. Unionization Efforts*, FORBES (Dec. 10, 2021), <https://www.forbes.com/sites/qai/2021/12/10/a-look-inside-this-years-biggest-us-unionization-efforts/?sh=28b5724578b1>; for more on the history of labor organizing in Silicon Valley, see Sam Harnett, *Tech Workers Organizing Is Nothing New ... But Them Actually Forming Unions Is*, KQED (June 2, 2021), <https://www.kqed.org/news/11874325/tech-worker-organizing-is-nothing-new-but-actually-forming-unions-is>.

both the United States and India.<sup>2</sup> Some employers have unequal levels of protection. For example, Google only bans caste discrimination in India and not the United States, an issue the Alphabet Union highlights on their website.<sup>3</sup> Developing common laws of the shop around caste at these employers could thus have ramifications on workforces on a transnational scale.

This Article will begin with a brief history of the American jurisprudence around caste. It will then consider how India has dealt with caste through both law and labor organizing. Next, the Article will investigate what aspects of current American law can be used to combat discrimination today, drawing on the experiences from South Asian contexts. Finally, this Article will examine the promise of labor arbitration as a medium-term solution for fighting caste discrimination in the American workplace. Though arbitration is a flawed tool, it still has advantages, particularly in light of judicial silence on caste and recent legislative defeats around ending caste oppression.

## **II. Background: The Battle over Caste in the United States**

On October 7, 2023, California Governor Gavin Newsom vetoed Senate Bill 403, which would have banned caste discrimination in the workplace.<sup>4</sup> This veto came on the heels of backlash against the ban by South Asian business owners and Republican state senators who

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<sup>2</sup> See *Our Campaigns*, ALPHABET WORKERS UNION (last visited Jan. 31, 2024), <https://www.alphabetworkersunion.org/our-campaigns> (“Alphabet’s anti-discrimination policy only explicitly prohibits caste-based discrimination in India: the policy should be raised to this standard worldwide, and caste should be included as a protected category to the US Code of Conduct.”).

<sup>3</sup> *Id.*

<sup>4</sup> *Governor Newsom Issues Legislative Update 10.7.23* at SB 403 <https://www.gov.ca.gov/2023/10/07/governor-newsom-issues-legislative-update-10-7-23/> (veto statement at <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-403-Veto-1.pdf>), also available at [https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=202320240SB403](https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240SB403)) [hereinafter *Veto Statement*]. The statement in relevant part reads: “[. . .] California already prohibits discrimination based on sex, race, color, religion, ancestry, national origin, disability, gender identity, sexual orientation, and other characteristics, and state law specifies that these civil rights protections shall be liberally construed. Because discrimination based on caste is already prohibited under these existing categories, this bill is unnecessary.”

contended the ban was a form of racial profiling that targeted South Asian businesses for prosecution.<sup>5</sup> Drafting the bill was even more contentious. State Senator Aisha Wahab was the principal sponsor of the bill and received multiple death threats soon after the bill was publicized.<sup>6</sup> Afterward, Wahab was also subject to a recall movement.<sup>7</sup> Wahab was supported in her efforts by Thenmozhi Soundararajan, a Dalit woman and founder of the Oakland-based Equality Labs, the largest Dalit civil rights group in the United States.<sup>8</sup> Soundararajan also faced fierce opposition in response to Equality Labs' support, such as when protests forced Google to cancel a talk with Soundararajan.<sup>9</sup>

The bill eventually passed the California legislature but failed at the Governor's desk. Governor Newsom reasoned that the ban was unnecessary as the list of protected categories in existing state anti-discrimination law should be read "broadly" to encompass caste.<sup>10</sup> This rationale was particularly galling to caste equality activists as it used against them their own premise that caste discrimination often goes alongside discrimination against statutorily protected identities.<sup>11</sup> However, while activists and scholars argued these protected identities

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<sup>5</sup> Aben  Clayton, *Ban on caste discrimination deemed 'unnecessary' by California governor*, THE GUARDIAN (Oct. 8, 2023), <https://www.theguardian.com/us-news/2023/oct/07/california-caste-discrimination-ban-vetoed-gavin-newsom> (statement by state senators Brian Jones and Shannon Grove that the bill would "not only target and racially profile South Asian Californians, but will put other California residents and businesses at risk and jeopardize our state's innovate edge.").

<sup>6</sup> Jenavieve Hatch, *Death Threats, Recalls, And Discrimination: Sen. Aisha Wahab Isn't Here 'To Waste Any Time'*, THE SACRAMENTO BEE (May 11, 2023), <https://sd10.senate.ca.gov/news/death-threats-recalls-and-discrimination-sen-aisha-wahab-isnt-here-waste-any-time>.

<sup>7</sup> *The divisive debate over California's anti-caste bill*, BBC (June 9, 2023), <https://www.bbc.co.uk/news/world-asia-india-65819688>.

<sup>8</sup> Clair Wang, *'Caste is anti-Asian hate': the activists fighting 'less visible' discrimination in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/2023/apr/17/caste-discrimination-california-law-thenmozhi-soundararajan>.

<sup>9</sup> Clayton, *supra* note 5.

<sup>10</sup> *Veto Statement*, *supra* note 4.

<sup>11</sup> *Caste in the United States: A Survey Of Caste Among South Asian Americans*. EQUALITY LABS at 26–27 (last visited Jan. 31, 2024), [https://equalitylabs.wpengine.com/wp-content/uploads/2023/10/Caste\\_in\\_the\\_United\\_States\\_Report2018.pdf](https://equalitylabs.wpengine.com/wp-content/uploads/2023/10/Caste_in_the_United_States_Report2018.pdf) [hereinafter *Caste Survey*] (showing how experience of caste bias often occurs alongside sex, race, and religious discrimination, such as anonymous survey

were relevant to caste, they also argued that banning caste discrimination should not rely on eventual judicial recognition and instead should become explicitly enshrined in statute through a belt-and-suspenders approach.<sup>12</sup> Newsom’s veto cited no judicial authorities to suggest that either federal or state courts contemplated extending standard protected identity categories to include caste.<sup>13</sup>

Governor Newsom’s veto was the culmination of a quiet but fierce civil rights battle in America’s most populous state. Its intensity was just one indicator of the rapidly changing demographics of American workers.<sup>14</sup> While there have been some increases in manufacturing more recently,<sup>15</sup> the largest increases have been in the technological sector.<sup>16</sup> Workers of South Asian descent are also among the nation’s fastest growing demographics.<sup>17</sup> According to the U.S. Census Bureau, Asian Indians became the nation’s largest Asian population group in 2020,

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respondent stating “In graduate school, an ‘upper’ Caste man , on finding out that I was one of the ‘lower’ Castes, tried to tell me that I was probably a ‘slut’ because of that and tried to sexually misbehave with me.”).

<sup>12</sup> *Myths and Facts on Caste*, EQUALITY LABS (last visited Jan. 31, 2024), <https://www.equalitylabs.org/what-is-caste/myths-facts-on-caste/>.

<sup>13</sup> *Veto Statement*, *supra* note 4.

<sup>14</sup> Wang, *supra* note 8. It should be noted that California is not the first U. S. jurisdiction to attempt to ban caste discrimination in the workplace. Seattle became the first jurisdiction in the United States to ban caste discrimination, passing an ordinance in February of 2023. SEATTLE, WASH. MUN. CODE § 3.110.260; *see also* Harmeet Kaur, *Seattle becomes the first city in the US to ban caste discrimination*, CNN (September 30, 2023, 7:24 PM), <https://www.cnn.com/2023/02/22/us/seattle-bans-caste-discrimination-cec/index.html>.

<sup>15</sup> Scott Horsley, *U.S. factories emerge as a strong point in a weakening economy*, NPR (Oct. 20, 2022), <https://www.npr.org/2022/10/20/1130021630/factories-factory-industrial-production-employment-jobs-economy> (“Factories added 467,000 jobs in the last 12 months. And factory production in September was the highest in 14 years, according to the Federal Reserve.”).

<sup>16</sup> Martin Reeves & Adam Job, *Tech will remain the economy’s key growth engine. Fortune’s Future 50 helps explain why*, FORTUNE (Dec. 11, 2023), <https://fortune.com/2023/12/11/future-50-tech-economic-growth-bcg/> (“Leading the pack in terms of total value generated—over the entirety of the nearly 100 years studied—are digital technology players, specifically, the ‘MAMAA’ companies (Meta, Amazon, Microsoft, Apple, and Alphabet), which now constitute more than a quarter of the value of the entire S&P 500. All five are currently among the 10 most valuable firms worldwide—with Nvidia and Tesla rounding out the stable of tech giants among the top 10.”).

<sup>17</sup> *Caste Survey*, *supra* note 11.

growing by over 50% to 4,397,737 between 2010 and 2020.”<sup>18</sup> The U.S. Census Bureau also noted that the Nepalese population grew by 250% from 2010 to 2020.<sup>19</sup>

This diversification of the American labor force has greatly enriched the social fabric of the United States. Unfortunately, workers of South Asian descent are also the target of multiple forms of discrimination, including discrimination based on caste.<sup>20</sup> Caste is a complex form of discrimination that American law has struggled to comprehend because it is founded in the indigenous traditions, practices, and religions of South Asia.<sup>21</sup> While caste discrimination is historically less common in the United States than discrimination based on race, gender, and sexuality, it still shares similarities. Indeed, in her book *Caste: The Origin of Our Discontents*, Isabel Wilkerson argues that race in the United States functions as a form of caste, and she sees strong similarities between caste in India and racial hierarchies in the United States.<sup>22</sup>

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<sup>18</sup> Brittany Rico, et al., *Asian Indian Was The Largest Asian Alone Population Group in 2020*, UNITED STATES CENSUS BUREAU (last visited Jan. 31, 2024), <https://www.census.gov/library/stories/2023/09/2020-census-dhc-a-asian-population.html>.

<sup>19</sup> *Id.*

<sup>20</sup> Wang, *supra* note 8.

<sup>21</sup> Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456 (Nov. 6, 2020), <https://harvardlawreview.org/2021/06/title-vii-and-caste-discrimination/>, Available at SSRN: <https://ssrn.com/abstract=3725938> or <http://dx.doi.org/10.2139/ssrn.3725938> [hereinafter *Title VII and Caste*]; see also M. Varn Chandola, *Affirmative Action in India and the United States: the Untouchable and Black Experience*, 3 IND. INT’L & COMP. L. REV. 101, 103 (“The Hindu caste system is a hierarchy of endogamous and permanent groups regulated by complex social codes and sanctions, and various behavior patterns, such as diet, dress, custom and occupation.”).

<sup>22</sup> ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 128 (2020) at 101–64; see also M. Varn Chandola, *Affirmative Action in India and the United States: the Untouchable and Black Experience*, 3 IND. INT’L & COMP. L. REV. 101, 103 (“The Hindu caste system is a hierarchy of endogamous and permanent groups regulated by complex social codes and sanctions, and various behavior patterns, such as diet, dress, custom and occupation.”). Besides India and the United States, Wilkerson also sees comparisons with Nazi Germany’s racism and India’s caste system, comparisons which “Esoteric Nazis” such as Savitri Devi and Asit Krishna Mukherji made much of during World War II, see NICHOLAS GOODRICK-CLARKE, *HITLER’S PRIESTESS: SAVITRI DEVI, THE HINDU-ARYAN MYTH, AND NEO-NAZISM*, New York University Press (1998) at 26 (quoting Devi statement that India’s Brahmanical elite represented the “the miracle that racial segregation can work.”) and at 110 n.1 (describing prevalence of pro-Nazi views among Brahmins besides Mukherji and citing SAVITRI DEVI, *SOUVENIRS ET RE’FLEXIONS D’UNE ARYENNE* 33–35, 39, 285–87 (1976) (in French)).

According to Wilkerson, South Asian caste and racism in the United States both appeal to divine will or the general sense that these delineations are beyond human control.<sup>23</sup> Additionally, both classifications are inheritable.<sup>24</sup> Both also historically feature a strong prohibition of intermarriage, drawn along lines of caste in India and race in the United States.<sup>25</sup> Connected to this prioritization of endogamy, race and caste are also often depicted in terms of purity and pollution.<sup>26</sup> Also, oppressed castes and oppressed racial groups both face stigma and dehumanization.<sup>27</sup> This dehumanization is also reinforced by acts of terror and cruelty, whether those acts are committed by Hindu Nationalists or by white supremacists.<sup>28</sup> All of this is underpinned by an ideology that there are inherently “superior” and “inferior” castes or races.<sup>29</sup>

Finally, both race in the United States and caste in South Asia bring an occupational hierarchy and an ideology that oppressed races or castes are “fit” for only certain types of labor.<sup>30</sup> Usually, this “fit” labor for oppressed castes is related to sanitation, manual labor, and

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<sup>23</sup> WILKERSON, *supra* note 22, at 17, 101–04, esp. 102 (describing similarities between the Hindu accounts of Manu creating the castes and early modern application of Noah’s curse of Ham to Africans).

<sup>24</sup> *Id.* at 105, 175–176, 180–81, 327.

<sup>25</sup> *Id.* at 109–14.

<sup>26</sup> *Id.* at 115–30, esp. 128 (“[African-Americans] and the Dalits bore the daily brunt of the taint ascribed to their very beings. The Dalits were not permitted to drink from the same cups as the dominant castes in India, live in the villages of the upper-caste people, walk through the front doors of upper-caste homes, and neither were African-Americans in much of the United States for most of its history. African-Americans in the South were required to walk through the side or back door of any white establishment they approached.”); *see also* Chandola *supra* note 21 at 103, (“Traditionally, untouchables lived under a strict system of segregation that was rigidly enforced. The penalties for breaking the rules of segregation were severe.”).

<sup>27</sup> *Id.* at 17, 27, 29, 141–50.

<sup>28</sup> *Id.* at 151–58; *see* L. A. KRISHNA IYER, SOCIAL HISTORY OF KERALA (1970), 47 (“A Dalit who comes closer than 95 paces to a Brahmin would pollute him and so the protectors and caretakers of the Brahmin families, the Nairs, would kill the defaulting Dalit in cruel ways.”); *see also* Mari Marcel Thekaekara, Opinion, *India’s Caste System Is Alive and Kicking—And Maiming and Killing*, THE GUARDIAN (Aug. 15, 2016), <https://www.theguardian.com/articleisfree/2016/aug/15/india-caste-system-70-anniversary-independence-day-untouchables>.

<sup>29</sup> *Id.* at 159.

<sup>30</sup> *Id.* at 76 (“Dalit names are generally “contemptible” in meaning, referring to the humble or dirty work they were relegated to, while the Brahmins carry the names of the gods. Generally, you must know the significance of the name, learn the occupation of their forefathers, and perhaps know their village or their place in the village to ascertain their caste.”).

caregiving, and often the occupation will be in a person's family name itself.<sup>31</sup> In contrast, dominant races and castes are “fit” for labor that relies on intellect and professional judgment, resulting in higher pay and greater social prestige.<sup>32</sup>

Labor and employment are essential components of caste as an identity, and the employment context is where most caste discrimination occurs in the United States.<sup>33</sup> The United States is growing in its labor unionization efforts,<sup>34</sup> both in the number of new union elections and in the renewed militancy of long established unions.<sup>35</sup> This unionization has been driven almost entirely by workers of color, with Black workers continuing to have the highest rates of unionization at 12.8% in 2022.<sup>36</sup> This rising tide of unionization has also foregrounded the challenges that racial and ethnic minorities have faced. These facts make organized labor, particularly the laws around organized labor, an especially promising route for combatting caste discrimination.

Before further examining caste as it exists among populations of South Asian descent, it bears emphasizing that this Article's legal analysis does not exclusively apply to these communities. Instead, the legal holes in American law discussed below can broadly apply to any sort of endogamous stratification. Some other recognized systems of endogamous stratification

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<sup>31</sup> *Id.* at 76.

<sup>32</sup> *Id.* at 363.

<sup>33</sup> This is not to imply that this is the only context in which caste bias can occur (e.g., in marriage), but employment is the context that is most robustly justiciable in the United States.

<sup>34</sup> See, e.g., Heidi Shierholz, Margaret Poydock, and Celine McNicholas, *Unionization increased by 200,000 in 2022*, ECON. POL'Y INST. (Jan. 19, 2023), <https://www.epi.org/publication/unionization-2022/>;

<sup>35</sup> There were 2,510 union representation petitions filed in fiscal year 2022, a 53% increase over 2021. Greg Rosalsky, *You may have heard of the 'union boom.' The numbers tell a different story*, NPR, Planet Money, Feb. 28, 2023, <https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story>. Though also see caveats to the extent of this growth (“[T]he absolute number of American workers in unions did, in fact, grow in 2022—by approximately 200,000. It's just that the number of non-union jobs grew faster.”). *Id.*

<sup>36</sup> Shierholz et al., *supra* note 34 (“The entire increase in unionization in 2022 was among workers of color—workers of color saw an increase of 231,000, while white workers saw a decrease of 31,000.”).

include the Osu caste system that exists among the Igbo people of Nigeria,<sup>37</sup> along with the Songbun caste system of North Korea.<sup>38</sup> Even in societies where a caste system has been formally rejected as a matter of law, the legacy of the previously endorsed stratification persists, such as in Japan where descendants of the Buraku still face discrimination in employment and marriage.<sup>39</sup> This Article focuses on South Asian caste practices because they are a form of endogamous stratification that affect the most workers in the United States, making them especially pressing to consider for labor and civil rights advocates. Caste practices are also the stratification with the most extensive scholarship available, allowing for the richest level of analysis within the scope of this Article to most vividly illustrate the gaps in current U.S. law.

### **III. Caste: Its Definition and Context**

As described by Guha Krishnamurthi and Charanya Krishnaswami, the caste system is an “amalgamation” of two different hierarchies: *varna* and *jati*.<sup>40</sup> *Varna* is the stratification which is most familiar to non-South Asian peoples, especially the name of the “highest” caste the *brahmana*, which constitutes the “priestly class.”<sup>41</sup> Alongside the *brahmana*, there is also the

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<sup>37</sup> Elijah Obinna, *Contesting Identity: The Osu Caste System Among Igbo of Nigeria*, 10 AFR. IDENTITIES 111 (2012); see also Tal Tamari, *The Development of Caste Systems in West Africa*, 32 J. AFR. HIST. 221 (1991) (explaining endogamous stratified communities in West Africa).

<sup>38</sup> Paul Eckert, *North Korea Political Caste System Behind Abuses: Study*, REUTERS (June 5, 2012), <https://www.reuters.com/article/us-korea-north-caste/north-korea-political-caste-systembehind-abuses-study-idUSBRE85505T20120606>.

<sup>39</sup> Hiroshi Wagatsuma & George A. De Vos, *The Ecology of Special Buraku*, in JAPAN’S INVISIBLE RACE: CASTE IN CULTURE AND PERSONALITY 113–28 (George A. De Vos & Hiroshi Wagatsuma eds., 1966).

<sup>40</sup> *Title VII and Caste*, *supra* note 21, at 460.

<sup>41</sup> This is such a well-known class that it even has entered American English. For instance, Massachusetts once had a dominant social class descended from the earliest settlers of the Massachusetts Bay Colony known as “Boston Brahmins.” Like the Brahmins in India, this self-perpetuating group dominated the most socially prestigious positions in law, academia, religion, and commerce. Surnames such as Adams, Cabot, Lodge, Elliot, Prescott, and Winthrop were key indicators of belonging to the Boston Brahmins. Schools such as Roxbury Latin and Harvard University were also major social nurseries of the Boston Brahmins. Like the Brahmins in India, they even possessed their own distinct accent and dialect. See Ronald Story, *Harvard and the Boston Brahmins: A Study in Institutional and Class Development, 1800–1865*, 8.3 J. OF SOC. HIST. (1975), 94, 121, <https://www.jstor.org/stable/3786717>. The adjective “Brahminical” has also long had a place in English, with the

*kshatriya* (the ruler or warrior class), *vaishya* (the merchant class), and *shudra* (the artisan class).<sup>42</sup>

However, there is another class, referred only as the *panchama varna* (“Fifth Varna”), and they are implicitly considered to sit outside the four-level hierarchy altogether.<sup>43</sup> Though the proper nomenclature is “Dalit,” those who belong to this unnamed Fifth Varna are sometimes referred to as “untouchables.”<sup>44</sup> While Dalits are often described as “lower caste”—indeed, the “lowest” caste—this Article will employ the term “oppressed caste,” a term advocated for by Dalit activists and supporters of caste equality that foregrounds the exploitation they face more effectively than the term “lower caste.” Likewise, this Article will use “dominant caste” to refer to those castes often described as “upper.”<sup>45</sup>

The *varna* hierarchy forms the coarse-grained system for caste, but the *jati* provides the much more fine-grained system that more precisely determines the sorts of occupations one may pursue and families into which one may marry.<sup>46</sup> The *jati* corresponds to various personal signifiers including linguistic background and geographic descent.<sup>47</sup> As Krishnamurthi and Krishnaswami point out, an individual’s *jati* is often the grouping that is much more practically

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first recorded instance happening in 1596; see s.v. Brahmanical (adj.), Oxford English Dictionary, <https://doi.org/10.1093/OED/1186937539> (last modified July 2023).

<sup>42</sup> *Title VII and Caste*, *supra* note 21, at 456.

<sup>43</sup> *Id.*; see also Chandola, *supra* note 21, at 102 n.6 (pointing out that many consider Dalits to be below the *shudra varna*).

<sup>44</sup> *Title VII and Caste*, *supra* note 21, at 456.

<sup>45</sup> See Kurshnamurthi and Krishnaswami, *supra* note 21 at 457 n. 6.

<sup>46</sup> *Id.*; Shareen Joshi, Nishtha Kochhar, and Vijayendra Rao, *Fractal Inequality in Rural India: Class, Caste and Jati in Bihar*, 1 OXFORD OPEN ECONOMICS (March 1, 2022) at 2, <https://doi.org/10.1093/ooec/odab004> (“Some non-government surveys have gathered some jati-level identifiers. These data confirm the importance of jati identity in modern India. Most marriages are contracted within jatis”).

<sup>47</sup> *Id.* at 2.

important.<sup>48</sup> Like with the *varna* system, the *jati* system has a large group of oppressed *jati*-s who are expected to stay consigned to menial, despised, and demeaning forms of labor.<sup>49</sup> An individual's caste identity is determined by the intersection of their *varna* and *jati*, two distinct but intertwined classifications.<sup>50</sup> This multi-dimensional understanding of caste, as will be seen later in this Article (Part I.V), poses problems for extending judicial protection of caste based on current jurisprudence around other forms of discrimination. However, we shall also see how arbitration—due to its flexibility and the extraordinary deference it enjoys by the courts—could adequately grapple with this complex reality in addressing possible cases of caste discrimination in the workplace.

One may describe caste as a “structure of social stratification that is characterized by hereditary transmission of a set of practices, often including occupation, ritual practice, and social interaction.”<sup>51</sup> The recently vetoed bill in California to ban caste discrimination provided a similar definition, defining caste as a “perceived position in a system of social stratification on the basis of inherited status.”<sup>52</sup> The bill then defined “a system of social stratification on the basis of inherited status” as an assortment of factors that non-exhaustively included an “inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private

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<sup>48</sup> *Title VII and Caste*, *supra* note 21, at 456.

<sup>49</sup> Joshi et al., *supra* note 46, at 1.

<sup>50</sup> *Title VII and Caste*, *supra* note 21, at 456.

<sup>51</sup> *Title VII and Caste*, *supra* note 21, at 459 (citing A NEW DICTIONARY OF THE SOCIAL SCIENCES 194 (G. Duncan Mitchell ed., 2d ed. 1979) (defining “social stratification” and explaining the concept of “caste”)).

<sup>52</sup> S.B. 403, 2023–2024 Leg., Reg. Sess. (Cal. 2023) at § 2(e)(9), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB403](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB403). According to Newsom’s veto message, this definition was considered redundant to current civil rights law in California, *see supra* note 4.

and public segregation, and discrimination; and social exclusion on the basis of perceived status.”<sup>53</sup>

As noted above, an important aspect of caste distinction is the assignment of traditional occupations to each caste.<sup>54</sup> While dominant castes are often associated with professional careers, both religious and commercial, oppressed caste occupations are usually more centered around perceived “dirty jobs” and manual labor such as agricultural workers, scavengers, cobblers, and street sweepers.<sup>55</sup> This is especially true of those in the Dalit caste.<sup>56</sup> Consider what a monumental impact this sort of oppression has on the world’s labor force. As noted above, the South Asian caste system shapes the life prospects of over 1.8 billion people across Bangladesh, India, Nepal, and Pakistan.<sup>57</sup> Thus, nearly a third of the world’s population lives under a hierarchical system that assigns labor roles based entirely on birth, often also restricting deeply personal freedoms, such as the ability to choose one’s life partner. Moreover, the *varna* and *jati* system in South Asia is only the most visible manifestation of caste, and other caste

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<sup>53</sup> S.B. 403, 2023–2024 Leg., Reg. Sess. (Cal. 2023) at § 2(e)(8), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB403](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB403).

<sup>54</sup> *Who Are Dalits?*, NAVSARJAN TR., <https://navsarjantrust.org/who-are-dalits> (detailing the subdivisions based on profession within the Dalit community).

<sup>55</sup> *Id.* (detailing the subdivisions based on profession within the Dalit community); see also *Title VII and Caste* at 461 (describing “lower” *jati* jobs).

<sup>56</sup> *Dalits*, MINORITY RTS. GRP. INT’L., <https://minorityrights.org/minorities/dalits>; see also Varsha Ayyar & Lalit Khandare, *Mapping Color and Caste Discrimination in Indian Society*, in *THE MELANIN MILLENNIUM* 71, 75, 83 (Ronald E. Hall ed., 2012).

<sup>57</sup> *Title VII and Caste*, *supra* note 21, at 456; see also *Population, Total—India, Pakistan, Bangladesh, Nepal*, WORLD BANK GRP., <https://data.worldbank.org/indicator/SP.POP.TOTL?end=2019&locations=IN-PK-BDNP&start=2019&view=bar> (searches for country populations).

systems exist throughout the world that also feature endogamous elements and association with certain forms of labor.<sup>58</sup>

#### **IV. Labor Lessons from India**

##### **IV.A The Law**

There are several obvious similarities between Indian and American law. Both governments are secular, federal constitutional republics with independent judicial review, influenced by both common law and the legacy of European colonialism. Additionally, both countries are large, multi-ethnic democracies still grappling with complex legacies of discrimination. India also has a long history of labor unions and has tackled caste discrimination in various ways. From the founding of the Republic, caste equity was a central goal. The Indian Constitution bans caste discrimination, reflecting the culmination of decades of organizing by Dalit workers.<sup>59</sup> Specifically, Article 17 provides: “‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.”<sup>60</sup> Additionally, the Constitution provides a form of affirmative action for oppressed castes in an attempt to reverse centuries of exclusion.<sup>61</sup> Despite these formal guarantees, caste discrimination persists in Indian society, especially

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<sup>58</sup> See, e.g., *supra* notes 37–39.

<sup>59</sup> Jaya Shrivastava & Rangabi Tanchangya, *Dalit Women's Quest for Justice: Cases from India and Bangladesh*, 21.2 ASIAN J. WOMEN'S STUD. 180, 191 (2015); M. RAJARAM, “Fundamental Rights and Fundamental Duties,” in INDIAN CONSTITUTION at 59–70 (2008).

<sup>60</sup> INDIA CONST., Art. 17.

<sup>61</sup> INDIA CONST., Art. 15(4) (“Nothing in [article 15] or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially, and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”) and Art. 46 (“The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”).

between workers and their bosses.<sup>62</sup> In response, India has seen increased labor organization in the tech sector, including the emergence of the All India IT & ITES Employees' Union.<sup>63</sup> These efforts operate within a bargaining framework that shares similarities with the United States's industrial shop floor approach: organizing labor workplace by workplace, defeating management one location at a time. Neither country relies on a sectoral model whereby employers and unions set standards across a whole industry. This shared framework makes the lessons of Indian union organization against discrimination especially transferrable to the American context.

A brief summary of Indian labor law provides helpful context. India has a history of labor legislation that reaches back to 1926, more than twenty years before independence.<sup>64</sup> While Indian law has long provided for the right to form labor unions, it has often not provided as many protections for the union to compel the employer to respond to and negotiate with the union.<sup>65</sup> Specifically, the right to enforce a collective bargaining agreement with the employer is reserved only to those who have registered.<sup>66</sup> The 1926 Trade Unions Act is foundational to Indian labor law, especially with regard to the rights of registered unions.<sup>67</sup> However, while registration confers several legal rights, registration does not compel an employer to recognize a union. <sup>68</sup>

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<sup>62</sup> Kaivan Munshi, Why Does Caste Persist?, INDIAN EXPRESS (Nov. 2, 2013 ), <https://indianexpress.com/article/opinion/columns/why-does-caste-persist> (“Given the segregation along caste lines that continues to characterize the Indian village, most social interactions also occur within the caste.”).

<sup>63</sup> See, e.g., All India IT & ITES Employees' Union (last accessed Feb. 1, 2024), <https://www.aiiteu.org>.

<sup>64</sup> Trade Unions Act 1926 (governs union formation and bargaining); Industrial Disputes Act 1947; Factories Act 1948.

<sup>65</sup> P.D. Raju, *Choosing Collective Bargaining Agent: The Andhra Pradesh Experience in India*, 42.4 INDIAN J. INDUS. REL. 696, 712 (2007); Anil K. Sen Gupta & P. K. Sett, *Industrial Relations Law, Employment Security and Collective Bargaining in India: Myths, Realities and Hopes*, 31.2 INDUS. REL. J. 144, 53 (2000), <https://doi.org/10.1111/1468-2338.00153>.

<sup>66</sup> Trade Unions Act (1926), Ch. II; Sunil Budhiraja, and Ujjwal Kumar Pathak, *Legal Provisions of Collective Bargaining: Contrasting India with Canada, China & Finland*, 53.3 INDIAN J. INDUS. RELS. 424, 425, 436 (2018).

<sup>67</sup> Trade Unions Act (1926), Ch. III, esp. § 19 (“Notwithstanding anything contained in any other law for the time being in force, an agreement between the members of a registered Trade Union shall not be void or voidable merely by reason of the fact that any of the objects of the agreement are in restraint of trade.”).

<sup>68</sup> Budhiraja & Pathak, *supra* note 66.

In the absence of nationwide legislation mandating recognition, Indian trade unions rely on “the sweet will of the employer,” as Sunil Budhiraja and Ujjwal Kumar Pathak put it,<sup>69</sup> a regulatory hole also recognized by the high court of Karnataka.<sup>70</sup> More recently, changes in Indian law have restricted the scope of the collective bargaining topics and further curtailed workers’ ability to use economic pressure and work stoppages.<sup>71</sup> Thus, Indian labor law faces several holes in its protections for labor organizing and these holes have been only widened by recent legislation.

As will be seen below, caste continues to shape the labor conditions and the rights of Indian workers in ways that may be unexpected yet still provide lessons for American labor. This Article discusses two examples: (1) the intersection of caste with other identities and (2) the intersection of caste with language and ethnicity. The first illustrates how India’s Supreme Court has struggled to provide a fully intersectional analysis of caste, while the second example shows how the lack of intersectionality can prove harmful to labor unions and worker organization.

#### **IV.B Caste, Race, and Sexuality**

Let us start with the first example. The Indian Supreme Court, while possessing a much more developed jurisprudence around caste than in the United States, still regularly draws on U.S. jurisprudence and theory around race in their opinions.<sup>72</sup> Moreover, Indian legal scholars

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<sup>69</sup> *Id.* at 426.

<sup>70</sup> *Workmen of Kampli Co-op. Sugar Factory Ltd. v. Management of Kampli Co-op. Sugar Factory Ltd.*, (1995) 1 LLJ 727 (Karn).

<sup>71</sup> See generally ARCHIN CHAKRABORTY ET AL., LIMITS OF BARGAINING: CAPITAL, LABOUR AND THE STATE IN CONTEMPORARY INDIA (2019), <https://doi.org/10.1017/9781108679275>; See also J.S. Sodhi, *Trade Unions in India: Changing Role & Perspective*, 49.2 INDIAN J. INDUS. REL., 169, 184 (2013), <http://www.jstor.org/stable/24546947>; Vidu Badigannavar & John Kelly, *Do Labour Laws Protect Labour in India? Union Experiences of Workplace Employment Regulations in Maharashtra, India*, 41.4 INDUS. L. J., 439–470 (2012); Santanu Sarkar, *How Independent Is India’s Labour Law Framework from the State’s Changing Economic Policies?*, 30.3 ECON. LAB. REL. REV. 422, 40 (2019), <https://doi.org/10.1177/1035304619863550>; Katherine Running, *The Liberalisation of India’s Labour Laws Within the National Manufacturing Policy 2011: Where Business Power and Social Policy Collide*, 31.2 J. INT’L COMPAR. SOC. POL’Y. 192, 208 (2015), <https://doi.org/10.1080/21699763.2015.1047397>.

<sup>72</sup> Sumit Baudh, *Demarginalizing the Intersection of Caste, Class, and Sex*, 20 (1) J. HUM. RTS. 127, at 133 (Jan. 1, 2021), <https://doi.org/10.1080/14754835.2020.1858402>.

have employed Kimberlee Crenshaw's theory of intersectionality to make sense of the nexus between Article 15 and Article 21 of the Indian Constitution.<sup>73</sup> In doing so, courts and commentators have also drawn on jurisprudence around the civil rights implications of being the target of a racial slur in the United States, particularly if one is Black.<sup>74</sup>

With this inspiration of American Law, also came its shortcomings. As noted by Sumit Baudh, Indian law has struggled to recognize the intersecting identities of transgender and non-binary Dalits.<sup>75</sup> Under Indian constitutional law, Dalits are classified as members of the “Scheduled Castes” and are therefore entitled to reserved positions in civil service and others.<sup>76</sup> Additionally, directing a caste based slur against a Dalit is seen as a form of hate speech.<sup>77</sup> Separately, transgender individuals—classified as an “Other” gender on the Indian census<sup>78</sup>—were formally recognized as a historically oppressed group and so also entitled to reservations due to the landmark decision *National Legal Services Authority v. Union of India*.<sup>79</sup> In that case, the court acknowledged that trans individuals are treated as “as untouchables.”<sup>80</sup> However, the court's reasoning ignored the possibility of somebody being both transgender and belonging to a scheduled caste, consequently overlooking the specific challenges often faced by those who are

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<sup>73</sup> Kimberlee Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics*, 1989(1) UNIV CHI. LEGAL F. 139–167 (1989); for application in Indian context, see Kalpana Kannabiran & Vasanth Kannabiran, Caste and gender: understanding dynamics of power and violence, 26(37) ECON. & POL. WKLY. 2130–2133 (1991).

<sup>74</sup> Baudh, *supra* note 72, at 133.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 127–128.

<sup>79</sup> *National Legal Services Authority v. Union of India*, 2014 INSC 275, para. 2 (joining *hijras* and eunuchs as legally recognized “other” genders).

<sup>80</sup> *Id.* (“Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, *they are sidelined and treated as untouchables* [ . . . ].”) (emphasis added); see also *id.* at para. 5 (“Further, it was also pointed out that the [transgender] community also faces discrimination to contest election, right to vote, employment, to get licences etc. *and, in effect, treated as an outcast and untouchable.*”) (emphasis added).

both, a phenomenon that the concept of intersectionality aims to better explain. This gap in Indian jurisprudence offers a key lesson for American efforts to address caste discrimination in the workplace: caste must not be treated as a discrete category, separate from other protected categories, amounting to something that is “tacked on” to a South Asian American worker’s race and sex.

#### **IV.C Tea Plantations and the Importance of Diversity for Solidarity**

The second example explores how caste operates in the context of labor on Indian tea plantations. Anthropologist Jayaseelan Raj explains that the plantation system of agriculture “transformed” traditional caste relations by causing forms of caste membership to take on new significance and caste oppression to take on different forms inside the capitalist enterprise.<sup>81</sup> Raj examines the class and caste dynamics of the large plantations inside the “Tea Belt” (mostly West Bengal and Assam),<sup>82</sup> and shows how caste intersected with the experience of a plantation worker.<sup>83</sup> At first, unions were a promising way to enfranchise and empower the plantation workers. The largest of these unions were all associated with parties: Centre of Indian Trade Unions (CITU) of the Communist Party of India-Marxist, All India Trade Union Congress (AITUC) of the Communist Party of India, Indian National Trade Union Congress (INTUC) of

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<sup>81</sup> JAYASEELAN RAJ, PLANTATION CRISIS: RUPTURES OF DALIT LIFE IN THE INDIAN TEA BELT, (2022) at 32, <https://doi.org/10.14324/111.9781800082274>. (“In Peermade, people of the same sub-caste greet each other with kinship terms meant for blood relatives, which is not usually done when referring to people of other castes/sub-castes [. . .] The by-product of such employment of caste in plantation production is that the tea companies in the Peermade tea belt treated the plantation Tamil Dalits not only as a proletariat, as a factor of tea production.”).

<sup>82</sup> Swatahsiddha Sarkar, “Labour Migration in the Tea Plantations: Colonial and Neo-Liberal Trajectories of Plantation Labour in the Dooars Tea Belt of West Bengal.” 2(1) J. MIGRATION AFF. 25, 26 (2019). <https://doi.org/10.36931/jma.2019.2.1.25-43> (“West Bengal is the second largest tea producing state in India, next only to Assam. It produces about 24% of the total tea produced in India.”).

<sup>83</sup> *Id.* at 33. (“This act of reformulating caste identity outside the workplace is an example of the communalisation of caste, a process of attempting to differentiate oneself from others to enhance social status or prestige. [. . .] *a high caste can add to, and a lower caste can detract from, the prestige of a status achieved on other grounds. Therefore, the values of caste ritual status were symbolically engaged in affirming class position.* [. . .] economic crisis and the weakening of the plantation system reinvented and intensified the caste hierarchy among the plantation workers, as will be discussed in other chapters.” (emphasis added) (internal citations omitted)).

the Indian National Congress, and Bharatiya Mazdoor Sangh (BMS) of the Bharatiya Janata Party (BJP).<sup>84</sup> Because the unions were workers' conduit to electoral politics, this provided unions with extraordinary power.<sup>85</sup> The unions appointed a few workers as conveners to mediate the relationship between the workers and the outside union leaders. However, Raj describes these conveners' power as only "nominal" and that they only served as a prop to conceal the truth that "[the union leadership] represent[ed] the interests of the estate management rather than those of the workers."<sup>86</sup> However, while they formally concealed the collusion, material facts made the true state of affairs all too obvious to the Dalit workers. For instance, relatives of union leaders would become estate managers. In a particularly ironic case, leaders associated with the Communist Party of India lived in bungalows owned by the planter.<sup>87</sup>

What led to this decline in the unions' abilities to serve their workers? One reason is that the political leaders were not plantation workers living locally from nearby.<sup>88</sup> Most importantly, they were usually non-Dalit. As Raj explains, "The [union leaders] have used the caste hierarchy, sociocultural capital and networks to retain dominance in union leadership."<sup>89</sup> Indeed, this dominance manifested on a personal level between the leadership and union rank-and-file. As Raj illustrates, Dalit workers addressed their union leaders as "sir," but technical workers' and unions' stewards, usually belonging to a more dominant caste, called them *Sakhāvu* (Malayalam

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<sup>84</sup> *Id.* at 40.

<sup>85</sup> *Id.* at 40–41 (expanding on the unions' institutional strength, Raj writes "[Unions] represented the workers in the Plantation Labour Committee (PLC – the wage board, a tripartite body comprising the state, tea companies, and the unions) and often mediated the negotiations with the company regarding the bonus rate, working conditions and any other disputes that arose in plantation production. They decided who should be promoted from temporary status to permanent.").

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

for “comrades”).<sup>90</sup> This collusion eroded workers’ belief in the union to sincerely advocate for their members’ interest. Even when the union seemed to resist the plantation’s owners, it was often seen as a “political gimmick planned by the leaders and the plants”—another manifestation of an “unholy alliance.”<sup>91</sup> Even though the unions ran the spectrum from communist to Hindu nationalist, the workers generally regarded them as conservative.<sup>92</sup> As a function of seeing all the unions as ultimately toothless and run by dominant caste workers in league with dominant caste planters, union membership itself began to look like a form of caste, becoming something that was simply passed down by generation instead of from a real commitment to the ostensible ideology espoused by the party.<sup>93</sup> These experiences in different Tea Belt plantations show one issue: a disconnect in the union can often cost the effectiveness of organized labor and solidarity. On the one hand, the disconnect may cause demoralization and a feeling the union is a rubber stamp. On the other hand, it may lead to splintering as workers begin to explore the political potential of other aspects of their identity— such as caste— at the expense of de-emphasizing class and broad worker solidarity.<sup>94</sup> Raj ultimately argues that, with caste and ethnicity as

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 44. (“This is in contrast to, for instance, what happened in the Tamil Nadu plantations, where the workers’ discontent with the major trade union wings of the Indian National Congress and Communist led to the growth of trade union wings of Dalit political parties.”) (internal citations removed); *see also* Raj’s discussion at 114–115 of youth worker uprising in several plantations and how factions between these youth fell along ethnic and caste lines in ways that affected: “*While political support varies from one case to another, it was clear that the Malayali-led political parties and trade unions would support the Malayali youth in any conflict with Tamil youth. Accordingly, the clash between the youths also revealed the relative power relations that these youths would be able to maintain with the unions [ . . . ] The event resulted in Pratheesh and the others becoming more openly conscious of their Tamil identity.* Their conversation came to reflect an increasing awareness of the marginality of their situation based on their Tamil identity. They noticed that those who assaulted them also belonged to the plantation working class, with the only difference being that Pratheesh and the others belonged to the Tamil minority, and they were not able to get the support of any political parties or union leaders. *This lack of support needs to be noted particularly because Pratheesh’s family and their extended kinship, on both of his parents’ sides, are members of the union attached to the ruling political party. At the same time, Murali’s family were affiliated to the union attached to the communist party, which has a stronger voice in negotiating local disputes in the Peermade region.*” (emphasis added).

catalysts, the “activities of trade unions were part of a broader emergence of a trade union bourgeoisie in Kerala and its role as a contractor of labour that could hire and fire workers.”<sup>95</sup>

## **V. Caste in the United States**

### **V.A The Law**

As the United States continues to attract more workers of South Asian descent, caste discrimination is expected to increase in prevalence.<sup>96</sup> In particular, this discrimination especially occurs in academic and academic-adjacent sectors such as medicine and technology.<sup>97</sup> The tech sector is especially likely to experience an increase in caste discrimination.<sup>98</sup> Indeed, evidence has already shown discrimination is rampant: in a recent survey, two-thirds of Dalit survey respondents reported experiencing some form of discrimination.<sup>99</sup> Additionally, recalling that a *jati* configuration correspond to many individual factors, Dalit workers often experience subtle caste identification attempts through questions on family origins, dietary habits, and other personal details.<sup>100</sup>

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<sup>95</sup> *Id.* at 21.

<sup>96</sup> *Caste Survey*, *supra* note 11, at 26–27, 39.

<sup>97</sup> Yashica Dutt, Opinion, *The Specter of Caste in Silicon Valley*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/opinion/caste-cisco-indian-americans-discrimination.html>; David Gilbert, *Silicon Valley Has a Caste Discrimination Problem*, VICE NEWS (Aug. 5, 2020), <https://www.vice.com/en/article/3azjp5/silicon-valleyhas-a-caste-discrimination-problem>.

<sup>98</sup> See, e.g., Paresh Dave, *Indian Immigrants Are Tech’s New Titans*, L.A. TIMES (Aug. 11, 2015), <https://www.latimes.com/business/la-fi-indians-in-tech-20150812-story.html>.

<sup>99</sup> *Caste Survey*, *supra* n.11, at 20.

<sup>100</sup> Nitasha Tiku, *India’s Engineers Have Thrived in Silicon Valley. So Has Its Caste System.*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley>.

While caste discrimination is increasing in the United States, so are lawsuits to fight it.<sup>101</sup> In a landmark case, Dalit workers filed a discrimination lawsuit against Cisco Systems in 2022. These cases tend to be in the tech sector as well, such as the 2022 discrimination lawsuit brought by Dalit workers against Cisco Systems.<sup>102</sup> As a sign of the gravity of the threats that Dalit workers face, the plaintiffs requested to be listed as John Does due to fears that the case's publicity would bring retaliation against their family in India, a request the trial court refused.<sup>103</sup> Ultimately, the appeals court reversed the trial court and granted the plaintiffs' request.<sup>104</sup> The Cisco Systems case, along with only limited recognition of the dangers of combatting caste discrimination, illustrate the rising trend of caste discrimination in the U.S. tech sector and the importance of developing alternative avenues for legal redress, such as labor arbitration.

As discussed briefly above, caste is constituted by a complex intersection between *varna* and *jati*. Because of these dynamics, reliant as they are on attributes such as surname and religious practices, caste is often poorly understood by those who are not subject to the stratification. This reliance holds true of other forms of endogamous stratification, too, since they are also often reliant on linguistic, dietary, and other highly culturally specific markers.<sup>105</sup> Because of this, discrimination based on an endogamous stratification is often a sort of insider

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<sup>101</sup> Thenmozhi Soundararajan, Opinion, *A New Lawsuit Shines a Light on Caste Discrimination in the U.S. and Around the World*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/opinions/2020/07/13/newlawsuit-shines-light-caste-discrimination-us-around-world/>.

<sup>102</sup> *Id.*; see also Paige Smith, *Caste Bias Lawsuit Against Cisco Tests Rare Workplace Claim*, BLOOMBERG L. (July 17, 2020), <https://news.bloomberglaw.com/daily-labor-report/caste-bias-lawsuitagainst-cisco-tests-rare-workplace-claim> [<https://perma.cc/2E6E-A7TN>]; Press Release, California Dep't of Fair Emp. & Hous., *DFEH Sues Cisco Systems, Inc. and Former Managers for Caste Based Discrimination* (June 30, 2020), [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/06/Cisco\\_2020.06.30.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/06/Cisco_2020.06.30.pdf).

<sup>103</sup> Dep't of Fair Emp't & Hous. v. Superior Court, 82 Cal. App. 5th 105, 297 (6th Cir. 2022).

<sup>104</sup> *Id.*

<sup>105</sup> Compare with Wagatsuma & De Vos, *supra* note 39 (describing how the Buraku are often discriminated against based on their family name, and how this discrimination is usually committed by other Japanese people as they are the ones mostly likely to be aware of the social significance of a particular Japanese family name).

discrimination, one committed primarily by those who are in the know about the relevant social signifiers for a particular placement in the stratification.

This aspect of endogamous stratification discrimination is also seen in the U.S. workplace. South Asian descent workers often already commit caste discrimination against one another. Most caste discrimination is already committed between workers of South Asian descent, often taking the form of a manager in a dominant caste discriminating against a subordinate worker who is part of an oppressed caste.<sup>106</sup> For instance, in 2018 a professor of dominant caste forced several of his graduate students of oppressed caste to work as his personal domestic laborers.<sup>107</sup>

This dynamic in the workplace between a dominant caste superior and an oppressed caste subordinate is partially a result of America immigration law.<sup>108</sup> After introduction of the H-1B visa in 1990, the United States saw a large increase in South Asian workers.<sup>109</sup> However, these workers, especially in the earlier years (and thus the ones who have had the most time to climb the corporate ladder), tended to be of a dominant class because the H-1B visa program was intended to primarily attract highly credentialed workers, exactly those types of workers whose labor was seen as “fit” for dominant castes.<sup>110</sup> Thus, the tech sector, business managers, and professions such as law and medicine saw some of the highest increases in South Asian workers.

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<sup>106</sup> E.g., *Indian-Origin Professor in the US Accused of Using Students as Domestic Workers*, THE WIRE (Nov. 20, 2018), <https://thewire.in/rights/indian-origin-professor-in-the-us-accused-of-using-students-as-domestic-workers>; Rishi Iyengar, *California sues Cisco for alleged discrimination against employee because of caste*, CNN (July 1, 2020), <https://edition.cnn.com/2020/07/01/tech/cisco-lawsuit-caste-discrimination/index.html>.

<sup>107</sup> *Id.*

<sup>108</sup> Wang, *supra* note 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; see also WILKERSON, *supra* notes 30–32 (discussing idea of “fit” labor being a component of both caste and race in the United States).

This disparate impact is still seen today, as a Carnegie Mellon University survey of Indian Hindus in the United States found that 87% were born into a dominant caste, while only 1% identified as Dalit.<sup>111</sup>

Despite American law having clear impacts on workers subject to caste, American law has generally refused to recognize caste as a legal concept.<sup>112</sup> Even when courts did provide any legal weight to the idea of caste, as with the case concerning Akhay Kumar Mozumdar, they tried to subsume caste under American racial categories.<sup>113</sup> With *In re Akhay Kumar Mozumdar*, the federal district court was considering whether Akhay Kumar Mozumdar, a dominant caste Indian man from the northwest region of India traditionally referred to as *Āryāvarta*, could apply for citizenship when federal statute limited naturalization to members of the “Caucasian race” only.<sup>114</sup> Because of Mozumdar’s origins, he would have been considered Aryan by contemporary racial classifications and thus, one with a historical connection to the “Caucasian race.”<sup>115</sup> The court ultimately ruled that Mozumdar was eligible to apply for citizenship, but its holding

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<sup>111</sup> *Id.*

<sup>112</sup> Curiously, the first mention of caste in a federal judicial opinion was rather oblique and began as an aside in a case about whether a recent Chinese immigrant was subject to the ten-year ban on Chinese labor immigration under the Chinese Exclusion Act. *The Chinese Merchant’s Case*, 13 F. 605, 613 (CA Dis. 1882). While the case’s facts were not related to the South Asian caste system, the court invoked it by way of comparison when discussing Chinese laborers: “It would not be easy, in all cases, for a Chinese laborer or coolie, whom alone it was the intention of the act to exclude, to simulate the dress, manners, and general appearance and bearing of the merchant, student, teacher, or traveler, who, in China, almost as much as in India, are separated from the common laboring classes by social and external differences which almost amount to a distinction of caste.” *Id.* This case does not suggest that the court was ready to incorporate caste into its jurisprudence, but one striking aspect of this quotation is that there was a dim awareness of caste’s labor component and that it intersects with many other facets of life. *See id.*

<sup>113</sup> *In re Akhay Kumar Mozumdar*, 207 F. 115, 117 (E.D. Wash. 1913).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

reflects the court's confusion.<sup>116</sup> The court acknowledged that the original intent of the federal statute was likely to restrict it to those who are coded as "white."<sup>117</sup> However, the court also admitted that "[i]t is likewise true that certain of the natives of India belong to that race, although the line of demarcation between the different castes and classes may be dim and difficult of ascertainment."<sup>118</sup> The court ruled an Aryan applicant was eligible for citizenship while also expressing skepticism that covering Indians under the Naturalization Act was the intent of Congress.<sup>119</sup>

The most influential case around caste is *United States v. Bhagat Singh Thind*, where the Supreme Court restricted "white" to those of European descent, effectively denying dominant caste Indians the protections of naturalization rights. This decision underscores courts' historical challenges in recognizing caste as a racial category in American jurisprudence.<sup>120</sup> The Court

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 118. ("I fully appreciate the fact that the lineage of the applicant in these matters must rest largely, if not entirely, upon his own testimony, and that the courts may be imposed upon; but they must administer the law as best they can until Congress sees fit to prescribe a more definite rule for their guidance. The testimony in this case satisfies me that the applicant has brought himself within the provisions of the Naturalization Act.").

<sup>120</sup> *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214–15 (1923) (denying high caste Aryan man was white) ("As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. *It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white*"); see also the extensive academic commentary on this case, e.g. *Note: Continually Creating Races: The Census in the United States and Brazil*, 20 NAT'L BLACK L.J. 42, 49 ("Though concepts of race in the United States often play out about the black/white divide, our history has witnessed numerous other racial and ethnic groups who have fought for recognition - either to be considered white or not to be considered white - throughout the years.") (citing *Bhagat Singh Thind*); Brant Lee, *The Network Economic Effects of Whiteness*, 53 AM. U.L. REV. 1259, 1300 n.223 ("Whiteness is, of course, much more than skin color or biology. Neither the Japanese Ozawa, who tried to prove how pale his skin was (*Ozawa v. United States*, 260 U.S. 178 (1927)), nor the Indian Thind, scientifically classified as Caucasian (*United States v. Thind*, 261 U.S. 204 (1923)), were (or are) deemed White.") (citations in original); WILKERSON, *supra* note 22, at 126 ("[Thind] sought to make common cause with his upper-caste counterparts in America [i.e. whites].").

would later extend the decision in *Thind* to deny others of Caucasian descent the label of “white,”<sup>121</sup> holdings that were later used in other naturalization cases in lower district courts, creating a trickle-down effect impacting immigrants to the United States from all over the world.<sup>122</sup> These court cases are helpful for demonstrating how prevailing racial categories in the United States are often very poor fits for thinking about matters of ancestry and descent outside of a North American or Northern European context.<sup>123</sup> Although caste is difficult to translate into American racial categories, it is still closely connected to race and ancestry. Indeed, Krishnamurthi and Krishnaswami have argued that caste discrimination can be analyzed as an intersecting nexus of identities that are already protected under current civil rights law, such as Title VII.<sup>124</sup>

Currently, the Supreme Court is unlikely to expand Title VII, though the but-for causal analysis of *Bostock v. Clayton County* offers hope for extending federal civil rights law in that direction.<sup>125</sup> Justice Gorsuch in his opinion for the Court provided the following gloss on but-for analysis under Title VII:

When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to the challenged employment decision. So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law.<sup>126</sup>

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<sup>121</sup> *Morrison v. California*, 291 U.S. 82, 85 (1934) (glossing “white persons” to refer to “members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men [ . . . ] the governing test always being that of common understanding.”) (internal citation removed).

<sup>122</sup> *See, e.g., In re Dow*, 213 F. 355, 359–65 (D.S.C. 1914) (denying naturalization to a Syrian immigrant despite their Caucasian descent, with the court explaining, “Whether [applicant] is of a white race, [ . . . ] is not decided as not pertinent to the issues of the application. All that the court decides is that the applicant, not being of European nativity or descent, is not a white person within the meaning of the naturalization statute.”).

<sup>123</sup> *See also Ex parte Shahid*, 205 F. 812, 814 (D.S.C. 1913) (expressing confusion on how to consider the race of Caucasian man for naturalization law).

<sup>124</sup> *Title VII and Caste*, *supra* note 21, at 456.

<sup>125</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738–39 (2020).

<sup>126</sup> *Id.*

Caste cannot be totally reduced to a mere combination of Title VII protected identities. However, if caste is conceptually linked to a protected identity, such as national origin, such a reduction suffices for Title VII protection.<sup>127</sup>

The prospect of adequate jurisprudence around caste discrimination emerging any time soon is low because caste is often seen as a mutable characteristic. Occupation and choice of diet are mutable characteristics, yet due to their historic association with caste, they become prime conduits for discriminatory actions.<sup>128</sup> Unfortunately, this makes protecting against caste discrimination challenging, as courts are highly reluctant to find discrimination based on anything but immutable characteristics. Therefore, a Dalit worker assigned menial tasks like bathroom cleaning might have difficulty proving that this assignment was due to caste discrimination, since courts may view the job as sufficiently related to caste to serve as a proxy for caste. The potential mutability of these characteristics also leads to a judicial diminishment of the persecution that oppressed workers face. While California state courts appear willing to recognize the dangers of caste discrimination, federal courts overall have been reluctant to recognize caste discrimination as grounds for asylum unless it poses a direct threat to a person's ability to earn a living.<sup>129</sup> For example, in 2010 the Eleventh Circuit in *Naik v. U.S. Attorney General* denied asylum to a Mogaveera man whose oppressed caste would force him to take only

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<sup>127</sup> Guha Krishnamurthi & Peter Salib, *Bostock and Conceptual Causation*, YALE J. REG.: NOTICE & ARTICLE (July 22, 2020), <https://www.yalejreg.com/nc/bostock-and-conceptual-causation-by-guha-krishnamurthi-petersalib>. (“[i]f a putative non-protected basis for discrimination conceptually depends on the protected characteristics of the plaintiff, then the basis for discrimination is ‘because of’ the relevant protected category.”).

<sup>128</sup> For the connection between occupation and caste, see CHANDRASHEKHAR BHAT, *ETHNICITY AND MOBILITY* 1–9 (1984); Padmanabh Samarendra, *Census in Colonial India and the Birth of Caste*, 46 *ECON. & POL. WKLY.* 51, 52 (2011) (explaining the variety of factors that inform *jati* identity, based in part on region). 30 *Who Are Dalits?*, NAVSARJAN TR., <https://navsarjantrust.org/who-are-dalits> (detailing the subdivisions based on profession within the Dalit community); see also *Title VII and Caste*, *supra* note 21, at 461 (describing lower *jati* jobs).

<sup>129</sup> *E.g.*, *Naik v. United States AG*, 402 F. App'x 451, 454 (11th Cir. 2010); *Sepulveda v. United States AG*, 401 F.3d 1226, 1231 (11th Cir. 2005).

menial, unhealthy, and physically dangerous work, eking out a bare existence in India.<sup>130</sup> The court justified its ruling by saying that “persecution is an extreme concept. Employment discrimination that stops short of depriving the individual of a means of earning a living, such as losing a desired job and being forced to take menial work instead, does not constitute persecution.”<sup>131</sup>

### **V.B American Labor Organizing Against Caste Discrimination**

As labor unions in the United States continue to advocate for workers’ rights, they have begun addressing new forms of discrimination, including caste. Given courts’ reluctance to recognize caste as a legal category, labor arbitration presents a promising route for unions to fill this gap. These efforts have mainly been in academic or academic-adjacent sectors, such as medicine and technology. For example, Harvard Graduate Students Union (HGSU) has achieved a ban on caste discrimination.<sup>132</sup> HGSU’s collective bargaining agreement with Harvard University reads:

Harvard University provides equal opportunity in employment for all qualified persons and shall not discriminate against any [Student Worker] on the basis of race, color, religion, caste, creed, sex, sexual orientation, marital status, parental status, pregnancy and pregnancy-related conditions, gender identity, gender expression, genetic information, national origin, ancestry, age, veteran status, military service, physical or mental disability, political beliefs, union activity or membership, or membership in other protected status under Massachusetts, federal or local law, or any University Policy.<sup>133</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Aparna Gopalan, The Fight Against Caste Oppression Comes to US Higher Education, NONPROFIT Q., (Jan 31, 2022), <https://nonprofitquarterly.org/the-fight-against-caste-oppression-comes-to-us-higher-education/>; Sakshi Venkatraman, Harvard adds caste bias protections for graduate student workers, NBC (Dec. 2, 2021), <https://www.nbcnews.com/news/asian-america/harvard-adds-caste-bias-protections-graduate-student-workers-rcna7279>.

<sup>133</sup> HARVARD GRADUATE STUDENTS UNION (HGSU), OUR CONTRACT, Article I, Sec. 7, SubSec. A. (Jan. 25, 2022), <https://harvardgradunion.org/wp-content/uploads/2022/02/Clean-version-of-new-CBA-no-red-lines-1-25-22.pdf>.

The CBA also provides the following definition of caste: “For purposes of this Article, the term ‘caste’ is defined as a system of rigid social stratification characterized by hereditary status, endogamy and social barriers sanctioned by custom, law, or religion, that originated in South Asia.”<sup>134</sup>

As of this writing, Northwestern University Graduate Workers (NUGW) have also secured a final language agreement for their CBA that would ban caste discrimination.<sup>135</sup> The Alphabet Workers Union has been at the forefront of pushing for the inclusion of caste protections in Google’s U.S. workforce, reflecting the growing importance of labor organizing in tech companies where caste-based bias is increasingly prevalent. Alphabet Workers Union is currently campaigning for Google to extend its anti-caste discrimination policy in the employee handbook for Indian workers to the United States.<sup>136</sup> This proactive approach to protecting workers, while American jurisprudence lags behind, is a familiar strategy. American labor unions have been important forces in protecting workers from human rights violations. For example, unions aligning with communist parties, such as the Share Croppers’ Union, were an important force in protecting Black workers in the Jim Crow South (particularly Alabama) prior to the start of the Cold War.<sup>137</sup>

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<sup>134</sup> *Id.* at Article I, Sec. 7, SubSec. C.

<sup>135</sup> See COLLECTIVE BARGAINING AGREEMENT BETWEEN UNITED ELECTRICAL, RADIO, AND MACHINE WORKERS OF AMERICA UE LOCAL 1122 (NUGW-UE) AND NORTHWESTERN UNIVERSITY, Art. XIX, Sec. 1, <https://www.northwestern.edu/graduate-union-resources/nu-nugw-ue-cba-3.15.24-3.31.27.pdf>. For breakdown of CBA provisions by university, see *Graduate Student Union Contract*, NW UNIV., <https://www.northwestern.edu/graduate-student-unionization/union-contract/> (last updated Sept. 23, 2024). For media coverage, see Jacob Wendler, *NU Graduate Workers reach tentative agreements on final language proposals*, DAILY NW (Nov. 1, 2023), <https://dailynorthwestern.com/2023/11/01/campus/nu-graduate-workers-reach-tentative-agreements-on-final-language-proposals/>.

<sup>136</sup> ALPHABET WORKERS UNION, *supra* note 2.

<sup>137</sup> ROBIN KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION (1990), *passim*, esp. 34–56 (About the activities of the Share Croppers’ Union).

Yet unions have not always been at the forefront of civil rights, as many unions maintained whites-only memberships.<sup>138</sup> Even when unions supported anti-discriminatory policies in the workplace and in public policy, during the Civil Rights Era union locals often opposed affirmative action policies as they worried the policies would undermine the seniority benefits extracted from the employer in the CBA.<sup>139</sup> However, more recently unions such as the United Farmworkers have continued the push for the human rights of workers and racial equality.<sup>140</sup> Today, unions often work with Black Lives Matters and other anti-racist organizations.<sup>141</sup> Recognizing discrimination as a workers' rights issue has become central to the American labor movement. Tech companies such as Amazon and Google along with universities such as Harvard, Yale, Emory, and Northwestern, are seeing unionization efforts that prioritize the concerns of diverse workforces facing multiple forms of discrimination.<sup>142</sup> These sectors are projected to have some of the highest growth in South Asian workers.<sup>143</sup> While America's courts have struggled to comprehend the reality of caste, America's labor unions have made significant

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<sup>138</sup> GILLIAN LAURA CREESE, CONTRACTING MASCULINITY: GENDER, CLASS, AND RACE IN A WHITE-COLLAR UNION, 1944-1994 (2014), <https://doi.org/10.3138/9781442659872>; David Macdonald, *Labor Unions and White Democratic Partisanship*, 43 (2) POL. BEHAV. 859 (2021), <https://doi.org/10.1007/s11109-020-09624-3>; Andrew Hazelton, LABOR'S OUTCASTS: MIGRANT FARMWORKERS AND UNIONS IN NORTH AMERICA, 1934-66 (2022), <https://doi.org/10.5406/j.ctv2vt046c>.

<sup>139</sup> Reuel Scholler, 25.1 BERKELEY J. EMPL. & LAB. L. 129, 136 (2004), <https://www.jstor.org/stable/24052176>.

<sup>140</sup> Marco Prouty, CÉSAR CHÁVEZ, THE CATHOLIC BISHOPS, AND THE FARMWORKERS' STRUGGLE FOR SOCIAL JUSTICE (2022), <https://doi.org/10.2307/j.ctv2nrzgrx>; TIM BOWMAN, LABOR'S OUTCASTS: MIGRANT FARMWORKERS AND UNIONS IN NORTH AMERICA, 1934-66 (2022), <https://doi.org/10.5406/j.ctv2vt046c>; for the early landmark case on labor rights and racial equality, see *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944) (union discriminated against its non-white members, court ruled Railway Labor Act required nondiscrimination in representation).

<sup>141</sup> Ken Green, *How Unions have Supported Black Lives Matter*, UNIONTRACK (Oct. 13, 2020), <https://uniontrack.com/blog/unions-black-lives-matter>; Eric Larson, *Black Lives Matter and Bridge Building: Labor Education for a 'New Jim Crow' Era*, 41.1 LAB. STUD. J. 36, 66 (2016), <https://doi.org/10.1177/0160449X16638800>.

<sup>142</sup> Olivier, Madi, *Graduate students file for unionization, push for better pay*, EMORY WHEEL (Sept. 6, 2023), <https://emorywheel.com/70005-2/>; Megan Vaz, *Graduate and professional student workers vote to unionize in landslide election* YALE DAILY NEWS (Jan. 9 2023), <https://yaledailynews.com/blog/2023/01/09/graduate-and-professional-student-workers-vote-to-unionize-in-landslide-election/>; Pavan Archarya and Fiona Roach, *NUGW union with United Electric, Radio and Machine Workers of America authorized following two-day election*, DAILY NW. (Jan. 12, 2023), <https://dailynorthwestern.com/2023/01/12/campus/nugw-union-with-united-electric-radio-and-machine-workers-of-america-authorized-following-two-day-election/>.

<sup>143</sup> *Caste Survey*, *supra* note 11, at 26-27, 39.

strides in fighting caste discrimination. As discussed, protections against caste bias are being introduced at universities such as Harvard and Northwestern, extremely wealthy institutions with very large workforces, a major step forward that may eventually become a standard provision in academic CBAs.

However, these advances have been relatively recent, and unions face numerous tactical decisions in adequately enforcing these provisions. This Article argues that labor arbitration, considering the current judicial and political terrains, is a sensible medium-term option for resolving caste-related disputes in a timely and fair manner. However, while arbitration is a decent option, it is valuable to consider how discrimination is fought in other countries to see what lessons may be gleaned there, and Indian labor organizers have vastly more experience with fighting caste oppression. It is now time to consider several lessons from the experience of Indian workers.

## **VI. Pursuing Caste Equity: What the United States Can Learn from South Asia**

### **VI.A Labor Arbitration in India**

This Article offers arbitration as a possible means for protecting against caste discrimination in the workplace. How does labor arbitration function in India, especially regarding caste-related grievances? As recognized by the Supreme Court of India in *Food Corporation of India*, Indian society has a long history of arbitration,<sup>144</sup> starting with the presence of panchayats in ancient India.<sup>145</sup> The court emphasized that arbitration has “tradition, it has a purpose.” The court also characterized arbitration as something capable of being

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<sup>144</sup> In *Food Corporation of India vs. Joginder Pal Mohinderpal and another*, (1989) 2 SCC 347 para. 6.

<sup>145</sup> ANURAG K AGARWAL, *CONTRACTS AND ARBITRATION FOR MANAGERS* 56 (2016).

especially attuned to the particularities of a locale by saying that it “evolved by the society.” Currently, Indian arbitration law is governed by the Arbitration and Conciliation Act of 1996 (ACA), which replaced the earlier Arbitration Act of 1940.<sup>146</sup>

One quirk of the ACA is that there is no statutory language providing for invalidating an arbitration decision due to clear violation of law, but in the 2003 case *ONGC v. SAW Pipes*, the Supreme Court of India established that clearly violative awards would be set aside for “public policy” reasons.<sup>147</sup> To support this ruling, the court relied on its earlier holding in *Renusagar v. General Electric*, which concerned an international arbitration governed under the Foreign Awards (Recognition and Enforcement) Act of 1961.<sup>148</sup> The court held that any violation of India law was against public policy; by extension, an international arbitration award that violated the Foreign Awards was void as a matter of public policy.<sup>149</sup> With *ONGC*, the Supreme Court strongly emphasized the contract as the prime directive of the arbitrator, even describing “the sanctity of the contract” as that which “forms the basis of the civilized society and also the jurisdiction of the arbitrator.”<sup>150</sup>

With the U.S. Supreme Court’s *Steelworkers Trilogy*, American labor arbitration derives its expansive powers and entitlement to judicial deference from the terms of the contract between

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<sup>146</sup> *Id.* at 57–58.

<sup>147</sup> *Oil & Natural Gas Corp Ltd v. Saw Pipes, Ltd.*, LNIND 2003 SC 444; *see also* AGARWAL, *supra* note 145, at 175–76.

<sup>148</sup> *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp. (1) SCC 644.

<sup>149</sup> *Id.* (“Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”).

<sup>150</sup> *Oil & Natural Gas Corp Ltd v. Saw Pipes, Ltd.*, LNIND 2003 SC 444. The full quotation reads: “It is to be reiterated that it is the primary duty of the arbitrators to enforce a promise which the parties have made and to uphold the sanctity of the contract which forms the basis of the civilized society and also the jurisdiction of the arbitrators. Hence, this part of the award passed by the arbitral tribunal granting interest on the amount deducted by the appellant from the bills payable to the respondent is against the terms of the contract and is, therefore, violative of Section 28(3) of the Act.”

union and employer.<sup>151</sup> While there are differences, such as the legal basis for voiding an arbitration award that clearly violates statutory law and India's much older societal tradition of arbitrating disputes, American and Indian jurisprudence converge in their deferential treatment of arbitrators. While the terms of the contract maintain preeminence, Indian arbitration law still allows divergence from the written contract if novation has taken place. For instance, in the unreported 2014 Supreme Court case *Ashoka Tubewell & Engineering v. Union of India*, the Union of India entered into a CBA with Indian Railways that included an arbitration agreement clause. However, Indian Railways had long neglected to appoint a standing arbitrator in pursuance of the CBA's terms, which provided that only an officer of Indian Railways could be appointed as an arbitrator.<sup>152</sup> To settle the dispute, both parties agreed to the appointment of a retired Supreme Court judge, but later the Union of India objected to the award of the arbitrator née judge.<sup>153</sup> The Court upheld the arbitrator's award, holding that a novation of the CBA had occurred by the Union's consent to the appointment of the judge.<sup>154</sup> One of the key lessons from this judgement in *Ashoka Tubewell* is that the Supreme Court is willing to consider parol evidence in interpreting an arbitrator's powers under the CBA.<sup>155</sup> While the judge did not meet the textual requirements of an arbitrator in the CBA, it upheld the award because the parol evidence altered the arbitration between the union and the railroad. This relaxation of common

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<sup>151</sup> *Infra* Section VI.B.

<sup>152</sup> *Ashoka Tubewell & Engineering v. Union of India*, para. 2–5 (Civil Appeal Nos. 9852-53 of 2014) (Not Reported). This seemingly unfair provision has been described as a “continuation of the colonial mindset. Though such a practice is in clear violation of one of the fundamental principles of natural justice—one should not be a judge in his/her own cause—yet the practice has been followed till date.” AGARWAL, *supra* note 145 at 59–60.

<sup>153</sup> *Ashoka Tubewell*, at para. 5.

<sup>154</sup> *Id.* at para. 15, 19–20.

<sup>155</sup> The CBA provision read “63.3(a)(iii). It is a term of this contract that no person other than a Gazetted Railway Officer should act as an arbitrator/umpire and if for any reason, that is not possible, the matter is not to be referred to the arbitration at all.” *Id.* at para. 2.

law rule against parol evidence in labor arbitration is similarly found in American jurisprudence and is a powerful feature for fighting caste discrimination through labor arbitration.

Thus, labor arbitration in India enjoys broad deference, and the decision in *Ashoka Tubewell & Engineering* shows the Supreme Court's willingness to relax common law contractual principles in favor of facilitating resolution of labor disputes through arbitration.<sup>156</sup> But how much has this labor arbitration been used to combat caste discrimination? The truth is not much, primarily for the reason American labor unions will have to rely so much on arbitration in the short term: India simply has a much more extensive legislative framework around caste discrimination, making arbitration largely unnecessary in this context. The Constitution of India contains several provisions that prohibit caste discrimination along with affirmative action policies aimed at correcting the historical injustices oppressed castes experience in the workforce.<sup>157</sup> Additionally, none of the Universal Bare Acts that cover caste-related abuses authorize arbitration to settle caste discrimination claims.<sup>158</sup> In the case of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act), which defines several labor-related caste atrocities,<sup>159</sup> each Indian state is actually obliged to establish an "adequate number of Courts to ensure that cases under this Act are disposed of within a period of two

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<sup>156</sup> For more on India's use of the parol evidence rule, see Mohd Akram Shair Mohamed and Ashgar Ali Ali Mohamed, *A Critical Appraisal of the Parol Evidence Rule in Contract Law*, 2014 PROC. SOCIOINT'L CONF. SOC. SCIS. & HUMANS. 865, 868 and 871, [https://www.ocerints.org/Socioint14\\_e-publication/papers/264.pdf](https://www.ocerints.org/Socioint14_e-publication/papers/264.pdf); see also *S. Saktivel (dead) by Lrs. Versus M. Venugopal Pillai and others*, (2001) 1 MLJ 40 (S.C.), para. 5 (recent consideration of parol evidence, allowing parol evidence showing oral deal altering a previous oral agreement).

<sup>157</sup> E.g., INDIA CONST., Arts. 14–17, 123.

<sup>158</sup> See generally Protection of Civil Rights Act, 1955; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; The Protection of Human Rights Act, 1993.

<sup>159</sup> Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Ch. II, § 3 (1)(h)-(j) ("(j) makes a member of a Scheduled Caste or a Scheduled Tribe to do "begar" or other forms of forced or bonded labour other than any compulsory service for public purposes imposed by the Government; (i) compels a member of a Scheduled Caste or a Scheduled Tribe to dispose or carry human or animal carcasses, or to dig graves; (j) makes a member of a Scheduled Caste or a Scheduled Tribe to do manual scavenging or employs or permits the employment of such member for such purpose;").

months, as far as possible.”<sup>160</sup> The Protection of Civil Rights Act also makes it a criminal offense for anybody who, “on the ground of untouchability,” imposes any “disability” related to “the practice of any profession or the carrying on of any occupation, trade or business [or employment in any job]” to be punished with imprisonment ranging from one and six months and a fine between one hundred and five hundred rupees.<sup>161</sup> However, that is not to say there is no room at all for arbitration when it comes to caste-related issues. In fact, India has a long cultural practice of using panchayats to settle caste disputes,<sup>162</sup> and the Indian Constitution preserves panchayats as an “institution (by whatever name called) of self-government constituted under article 243B, for the rural areas.”<sup>163</sup> There are key differences between the tradition of resolution by panchayats and the more modern practice of labor arbitration. The biggest difference is that the panchayats were in a sense specialists: they were needed whenever a dispute around caste arose but not needed as much during other disputes.<sup>164</sup> A perverse incentive can thus arise for the panchayats to be invested in the continued relevance of caste lest their services no longer be required.<sup>165</sup> The aforementioned examples are places where caste continued to rear its head in many contexts, giving the panchayat bountiful opportunities for employment.

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<sup>160</sup> Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Ch. IV, § 14 (2).

<sup>161</sup> Protection of Civil Rights Act, 1955, § 4(iii).

<sup>162</sup> AGARWAL *supra* note 145, at 56; Anagha Ingole, CASTE PANCHAYATS AND CASTE POLITICS IN INDIA (2021), *passim*.

<sup>163</sup> INDIA CONST., Arts. 243(d), *see also generally* Art. 243.

<sup>164</sup> ANAGHA INGOLE, CASTE PANCHAYATS AND CASTE POLITICS IN INDIA 27 (2021).

<sup>165</sup> *Id.* (“Over their long historical unfolding, caste panchayats inevitably found new reasons to maintain caste throughout different periods. As the meaning of caste itself changed what it was about caste that was to be maintained also changed.”).

Local panchayats are invested in maintaining “proper” relations between the castes,<sup>166</sup> with dominant caste people upholding their obligations to oppressed caste people.<sup>167</sup> As Anagha Ingole argues in his sociological study of panchayats:

[G]enerally speaking the present day caste panchayats are political actors directing the more visible political behaviour in the regions in which they are located—such as political preferences and voting behaviour of caste members—and more specifically speaking, given the nature of the political field in the past thirty years or so, caste panchayats playing that general role turns on generating in the individual members of the caste over which they have their informal authority of governance, a specific socio-economic self-perception about the caste group to which they belong. Call this ‘The Claim’.<sup>168</sup>

Centering somebody’s self-perception around their caste instead of their status as a worker can serve as a motivation for seeking arbitration from panchayats, but it can also serve as fuel for the rise of reactionary caste-based politics that stokes increased caste violence.<sup>169</sup> As discussed below, this is a point of comparison that might seem to speak strongly against the use of labor arbitration in an American context. Would arbitration not lead to forming somebody’s self-perception around caste, leading to a possible lack of solidarity? Perhaps, but it’s not uniquely so compared to any other form of discrimination bans that require a person to be aware that they belong to that protected identity, such as in arbitration around discrimination based on sexual orientation. Moreover, labor arbitration assumes a different legal background. Panchayats function to maintain order within a caste hierarchy; they arbitrate based on the parties *as respective members of their caste*. This is somewhat different than in a labor arbitration, where the arbitration is based on the parties who are both bound to the collective bargaining agreement.

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<sup>166</sup> LOUIS DUMONT, *HOMO HIERARCHUS: CASTE SYSTEM AND ITS IMPLICATIONS* 175 (1980) (“It could be said that the task of the panchayat is above all to settle conflicts, whether by arbitration or by passing sentence. However, this would not be enough, for it is beyond doubt that caste “will keep all its members within the bounds of duty.”).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 77.

<sup>169</sup> *Id.* at 80 (“In the post-Mandal political context, caste identity became the major category around which the politics of governmentality came to be performed by the neo-liberal state.”).

Their caste membership is not what brings them “to the table” of the arbitrator, so much as it was arguably a violation of the CBA that a worker was treated differently based on their caste. As later discussed in Part VI.E, this focus on the collective bargaining agreement has its own serious downside, but it does introduce a significant difference in the context of arbitration.

With that, it is time to turn to the most promising weapon (even if just closest at hand) for fighting caste discrimination in the United States: the labor arbitrator.

### **VI.B Arbitration as a Path to Stopping Caste Discrimination**

Organized labor in the United States can benefit from including caste as a protected class in their collective bargaining, mainly using existing language such as that found in California’s senate bill.<sup>170</sup> As India’s labor is organized similarly to American labor through a shop floor industrial model with a collective bargaining agreement, the United States can readily borrow from their example.<sup>171</sup>

One major difference between American and Indian labor law is the former’s ability to compel employer recognition of a labor union. This is often considered a significant hole in Indian legislation, and it has resulted in a protracted debate over including it.<sup>172</sup> In contrast, an American labor union that wins an election approved by the National Labor Relations Board (NLRB) can compel the employer to bargain with them as the exclusive representative for the

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<sup>170</sup> S.B. 403, 2023–2024 Leg., Reg. Sess. (Cal. 2023) at § 2(e)(8) (defining “ancestry” for § 51(c) as including caste at (8), defining “caste” at (9)) ((8) “*Ancestry*” includes, but is not limited to, lineal descent, heritage, parentage, caste, or any inherited social status. Nothing precludes a person from alleging discrimination on the basis of ancestry in combination with discrimination based upon other protected characteristics. (9) “Caste” means an individual’s *perceived position in a system of social stratification on the basis of inherited status*. “A system of social stratification on the basis of inherited status” may be characterized by factors that may include, but are not limited to, inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, *private and public segregation, and discrimination; and social exclusion on the basis of perceived status.*”) (emphasis added), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240SB403](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB403).

<sup>171</sup> Trade Unions Act (1926).

<sup>172</sup> Budhiraja & Pathak, *supra* note 66, at 425–26.

designated collection of employees.<sup>173</sup> There are also circumstances in which the NLRB may compel an employer to recognize the union, even if the union failed to win the majority of votes in a designated election.<sup>174</sup> While the 2023 decision in *Cemex* did not restore the long-sought-after *Joy Silk* standard, which would require an employer to show a good faith reason for insisting on an election after a majority of designated workers signed union cards,<sup>175</sup> the NLRB made compelled union recognition a more viable penalty for an employer's unfair labor practices during an election.<sup>176</sup> Unionization efforts in technology and academic sectors can expect to face strong anti-union efforts by employers, but recent NLRB decisions such as *Cemex* have somewhat eased the path for a union's drive towards recognition and bargaining.<sup>177</sup>

However, while American law may speak more directly on employer recognition, employers still have many ways to defeat and demoralize a union campaign. It is only once an election is won or the employer acts egregiously during the election that a union can force recognition.<sup>178</sup> Technology companies can be highly aggressive in their anti-union tactics, including spying on union organizers and holding mandatory meetings with captive audiences, and this can only be expected to continue. If so, then including caste equity protections into

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<sup>173</sup> National Labor Relations Act, 49 Stat. 449 (1935), as amended; 29 U.S.C. at § 9 (“Representatives designated or selected for purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”).

<sup>174</sup> *Cemex Construction materials Pacific, LLC*, 372 N.L.R.B. 2 (N.L.R.B. Aug. 25, 2023).

<sup>175</sup> *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enfd. in relevant part*, 185 F.2d 732, (D.C. Cir. 1950), *cert. denied* 341 U.S. 914 (1951).

<sup>176</sup> *Cemex Construction materials Pacific, LLC*, 372 N.L.R.B. No. 130 at 25 n.135,29, *see also* Brandon R. Magner, *The Good-Faith Doubt Test and the Revival of Joy Silk Bargaining Orders*, 56 U. MICH. J. L. REFORM 151, 167–78 (2022) (discussing Board's retreat from *Joy Silk*).

<sup>177</sup> *Id.*

<sup>178</sup> National Labor Relations Act § 8(a)(5) “It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9(a)”) and § 9 *supra* note 173; *see also* *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (allows for NLRB to set aside election and compel bargaining by employer with union if employer commits unfair labor practice after being presented with union authorization cards by majority employees in proposed bargaining unit).

resulting bargaining agreements will also face a hard road. Thus, it is worthwhile to consider how technology workers in India have organized, given they have even less legal backing than American workers.

As seen above, while individual Indian and American states may have more extensive labor regulations than their respective national governments, overall American labor law is more comprehensive than India's (Part V.A). However, when it comes to caste, the situation is reversed. India has an extensive jurisprudence on caste (including multiple provisions of the Constitution of India), while the United States has almost none (Part III.A). This is a major hole in American law. As the experiences on the tea plantations showed, caste is more than something that only Hindus experience, and it often is expressed along ancestral and gender lines. As shown by Krishnamurthi and Krishnaswami, while caste can be partially described as an intersection of already protected identities, it is not reducible into just that constellation.<sup>179</sup> Fighting caste discrimination is therefore also a fight against a host of different discriminations, including those under Title VII.<sup>180</sup> However, with a conservative Supreme Court and legislative defeats in ostensibly progressive states such as California, the road to enshrining caste equity into American law seems long.

In the meantime, labor unions can offer additional protections, since collective bargaining agreements must comply with federal civil rights law but they are permitted to surpass those laws by providing protections.<sup>181</sup> This could be accomplished by adding an explicit protection for caste in a CBA's anti-discrimination provision. However, it is not an easy task to convince an

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<sup>179</sup> *Title VII and Caste*, *supra* note 21, at 480–81.

<sup>180</sup> *Id.* at 471–81.

<sup>181</sup> Since other forms of discrimination are still issues of “wages, hours, and other terms and conditions of employment.” National Labor Relations Act, 49 Stat. 449 (1935), as amended; 29 U.S.C. § 8(d).

employer to add more to the contract outside of mandatory bread-and-butter issues such as pay and seniority. Unless the provisions include management rights, employers often see these extra provisions as just further potential grounds for later union grievances they will have to resolve. Many CBAs include a boilerplate anti-discrimination provision borrowed from Title VII, but this list mostly just reaffirms the employer's preexisting legal obligations. Adding more to this list, such as making caste an explicitly protected identity, may prove difficult for the union if the employer is particularly recalcitrant.

There is another route through arbitration awards and the development of a particular "industrial common law of the shop." Thanks to the Supreme Court's *Steelworkers Trilogy*, federal courts generally loath overturning labor arbitration decisions.<sup>182</sup> As explained in the NLRB case *International Harvester Co.*, deferral is called for if the award was not "at variance with settled law and therefore clearly repugnant to the purposes of the Act."<sup>183</sup> This deference is especially appropriate because of the value of an arbitrator's understanding of the industrial common law of the shop. As Justice Douglas explained in the third of the *Steelworkers Trilogy* cases, arbitrators are "indispensable agencies in a continuous collective bargaining process."<sup>184</sup>

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<sup>182</sup> *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (in a CBA which delegates all grievances to arbitration, the court must defer to the arbitrator on the merits and equity of the grievance and even on whether the CBA has operative language to support the grievance); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (arbitration is the presumed place of resolution of all grievances under a CBA that includes an arbitration provision unless the CBA expressly excludes certain grievances from arbitration); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960) (Court has to defer to arbitrator's interpretation of the collective bargaining agreement, even if they would have construed the contract differently).

<sup>183</sup> *International Harvester Co.*, 138 N.L.R.B. 928 (1962).

<sup>184</sup> *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. at 596–97 (1960); *see also* *United Parcel Service, Inc.*, 309 N.L.R.B. No. 1 (2019) (explaining that broad deference to arbitration decisions "realizes [the Board's] statutory duty, rather than abdicates it [ . . . ]."). In *United Parcel Service*, the Board returned to its holding in *Spielberg, Mfg. Co.* that it would defer to arbitral proceedings that "appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is *not clearly repugnant to the purposes and policies of the act.*" *United Parcel Service, Inc.*, 309 N.L.R.B. No. 1 (2019) (quoting *Spielberg, Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955)) (emphasis added); *accord International Harvester Co.*, 138 N.L.R.B. at 928 (deferral is called for if the award was not "at variance with settled law and therefore clearly repugnant to the purposes of the Act.").

Arbitrators are able to settle disputes that require specific knowledge of “the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.”<sup>185</sup> Arbitrators are able to settle disputes that require specific knowledge of “the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.”<sup>186</sup> Because American law scarcely covers caste, *International Harvester* and the *Steelworkers Trilogy* arbitrators would have extensive leeway in developing a progressive industrial common law to protect oppressed caste workers.

Arbitration presents several known advantages to both management and labor.<sup>187</sup> Specifically for labor, arbitration is usually significantly faster, cheaper, and less disruptive than litigation<sup>188</sup> and involves far fewer procedural steps than judicial resolution.<sup>189</sup> However, other features of arbitration may be especially helpful to oppressed caste workers, such as confidentiality. As seen above, Dalit workers speaking out or taking legal action often have to do so behind pseudonyms due to credible fear of retaliation.<sup>190</sup> But court litigation defaults to stating the involved worker’s name— in the case name, filings, and deciding opinions. The worker may successfully move to be called John Doe or Jane Doe, but such a motion is not

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<sup>185</sup> *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. at 596–97 (1960).

<sup>186</sup> *Id.*

<sup>187</sup> Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490 (1959) (describing how arbitration is crucial for parties—like employer and employee—who are in a constant and interdependent relationship).

<sup>188</sup> William Spalding, *Arbitrator’s Authority and the Common Law of the Shop*, 40 WASH. & LEE L. REV. 790, 838 (1983) (“collective bargaining agreement often incorporates the arbitration process to allow for the final resolution of unforeseen disputes without resorting to judicial arbitration.”); CHARLES MORRIS, TWENTY YEARS OF TRILOGY: A CELEBRATION, IN DECISIONS THINKING OF ARBITRATORS AND JUDGES, PROCEEDINGS OF THE 33D ANNUAL MEETING OF NAA (Stearn & Dennis eds., 1981), at 331. These advantages are well known in India as well, *see* AGARWAL, *supra* note 145, at 48.

<sup>189</sup> FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 360 (2016 Kenneth May, Patrick Sanders, and Michelle Sullivan eds.); *but see* Timothy Heinsz, David Lowry, & Joan Torzewski, *The Subpoena Power of Labor Arbitrators*, 1979 UTAH L. REV. 29, 40 (1979).

<sup>190</sup> *Dep’t of Fair Emp’t & Hous. v. Superior Court*, 82 Cal. App. 5th at 297.

automatically granted.<sup>191</sup> In contrast, arbitration decisions—especially when done under an arbitrator belonging to the American Arbitrators Association (AAA)—often do not include the name of the worker(s) involved in the arbitration anywhere in the reasoned award, and instead title the awards by employer.<sup>192</sup> The confidentiality of the agreement is usually enforceable, absent typical exceptions by common law such as duress, and this enforceability extends from the same general federal policy in favor of arbitration.<sup>193</sup> Oftentimes, the arbitrator redacts the employer’s name as well and just provides the reasoned award a number under AAA’s awards classification system.<sup>194</sup> This feature of arbitration practice, while not often remarked upon, could provide some ancillary level of protection to an oppressed caste worker.

Finally, even when the arbitrator’s award seems surprising, or the arbitrator’s rationale seems implausible or is entirely absent, courts will usually leave the arbitrator’s decision undisturbed,<sup>195</sup> so long as the decision draws on the “essence” of the collective bargaining agreement.<sup>196</sup> Uniquely, the Labor Management Relations Act (LMRA) grants a higher level of deference to labor arbitration than it does to commercial arbitration.<sup>197</sup> And this deference

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<sup>191</sup> *Id.*; see also CA CIV. PROC. CODE § 422.40 (Deering 2024), requiring names be included in the initial complaint for all “real parties in interest—anyone with a substantial interest in the subject matter of the action.”

<sup>192</sup> Mitch Zamoff, Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions. 59.3 AM. BUS. L. J. 505, 557 at 506 (2022), <https://doi.org/10.1111/ablj.12211> (“The promise of confidentiality is the primary reason many disputants elect to arbitrate.”).

<sup>193</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (“The “principal purpose” of the [Federal Arbitration Act] is to “ensur[e] that private arbitration agreements are enforced according to their terms.”) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 and 489 (1989)); accord *Stolt-Nielsen S. A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662, 681-682 (2010). Stephen Goldberg, Frank Sander, Nancy Rodger, & Sarah Cole, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 235 (2012)).

<sup>194</sup> *E.g.* 4663105-AAA, Redacted, 139 BNA LA 721 (2019) (Fullmer, Arb.), cited by Elkouri and Elkouri’s classic treatise on arbitration for several propositions about labor arbitration over seniority provisions in an education CBA, *ELKOURI & ELKOURI*, *supra* note 188, at 446 n.73, 557 n.115, and 614 n. 188.

<sup>195</sup> *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

<sup>196</sup> *Id.*

<sup>197</sup> *NFL Mgmt. Council v. NFL Players Ass’n*, 296 F. Supp. 3d 614, 623 (S.D.N.Y. 2017) (“a more searching standard of review [comparable to commercial arbitration] would contravene the LMRA’s purpose of promoting efficient dispute resolution.”), see also *ELKOURI & ELKOURI*, *supra* note 188, at 24–25.

extends even to an arbitrator's interpretation of collateral law, including anti-discrimination law.<sup>198</sup>

It bears emphasizing how important this is. Commercial arbitration does indeed enjoy a high standard of deference, typically requiring the arbitrator's decision display a "manifest disregard" of the law before the court will disregard the decision.<sup>199</sup> As noted by the Second Circuit, this deference standard "clearly means more than error or misunderstanding with respect to the law,"<sup>200</sup> indicating that it requires more than just an objection to the outcome of the arbitration.<sup>201</sup> While there is no Supreme Court decision directly addressing this deference standard, appellate courts have often included a psychological element, requiring the arbitrator to be fully conscious of the current law and to make a deliberate choice to ignore it.<sup>202</sup> A deference exceeding even this standard is truly special, and that appears to be how courts are willing to treat labor arbitration in practice.

Frank Elkouri and Edna Asper Elkouri have raised questions about whether this is the same standard enjoyed by labor arbitration,<sup>203</sup> with cases suggesting that the main difference between labor arbitration and commercial arbitration lies in the overriding authority of the collective bargaining agreement over the arbitrator.<sup>204</sup> As noted by the Supreme Court, the arbitrator's "source of authority is the collective-bargaining agreement, and he must interpret and

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<sup>198</sup> CORPUS JURIS SECUNDUM, ARBITRATION AND AWARD, § 105 at 251 (explaining the common law around arbitrator discretion) ("it is ordinarily held that an award is not vitiated or rendered subject to impeachment merely because it is based upon, or has resulted from, a mistaken or erroneous view of the arbitrators as to the law or facts, or both.").

<sup>199</sup> *M&C Corp. v. Erwin Behr & Co.*, 87 F.3d 844, 851 (6th Cir. 1996); *see also* ELKOURI & ELKOURI, *supra* note 188, at 65.

<sup>200</sup> *Carte Blanche PTE Ltd. v. Carte Blanche Int'l*, 888 F.2d 260, 265 (2d Cir. 1989).

<sup>201</sup> *D.R. Sec. v. Professional Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988).

<sup>202</sup> *See, e.g., M&C Corp.*, at 851; efficient dispute resolution."); ELKOURI & ELKOURI, *supra* note 188, at 65.

<sup>203</sup> *Id.*

<sup>204</sup> *Roadmaster Corp. v. Laborers Local 504*, 851 F.2d 886, 888 (7th Cir. 1988) (vacating an arbitrator's award upon appeal by an employer).

apply that agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties. *The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.*”<sup>205</sup>

For a few decades there has been an increase in arbitrations around CBA grievances over statutory employee rights.<sup>206</sup> Unless the parties, through the CBA, specifically limit the powers of the arbitrator in deciding various aspects of the issue submitted to him, it is presumed that they intend to make him the final judge on any questions that arise in the disposition of the case, including questions of fact, questions of contract interpretation, rules of interpretation, and any issues with statutory law.<sup>207</sup> What matters most of all is that these interpretations do not disregard the terms of the collective bargaining agreement. Because many instances of caste discrimination also constitute Title VII violations, arbitrators may use their wide discretion on arbitration awards to interpret Title VII to include caste under the *Bostock* standard, so long as the CBA includes some sort of anti-discrimination provision that basically emulates Title VII. To emphasize, this would still not replace explicit inclusion of caste in a CBA’s anti-discrimination provision (the preferred option since the CBA’s text is supreme over even the arbitrator), but it would provide an opening for providing a modicum of justice to victims of caste discrimination.

Thus, as will be examined more below, arbitrators are the ultimate double-edged sword on civil rights in a labor context. They provide unions with an efficient route for robustly enforcing their anti-discrimination provisions without having to enter into new contract

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<sup>205</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (emphasis added).

<sup>206</sup> *Compare Academy Board Endorses ADR Task Force Prototype*, 104 DAILY LAB. REP. (BNA), at A-4, A-5 (May 31, 1995), with ELKOURI & ELKOURI, *supra* note 188, at 11.

<sup>207</sup> *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); ELKOURI & ELKOURI, *supra* note 188, at 218.

negotiations. However, they can also possibly serve as the death knell of a discrimination case which could have easily succeeded in court.

### **VI.C Caste Diversity and Intersectionality in the Workplace**

Part V gave several examples of when caste intersects with other identities that American law has already made substantial progress in articulating. This presents a further way in which arbitration may be especially helpful: arbitrators who are aware of the concept of intersectionality will be able to construe the anti-discrimination provisions of a CBA with greater sensitivity towards the intersectional experience of workers suffering from caste discrimination.<sup>208</sup> The experience of the anonymous Dalit women at major tech companies highlight caste discrimination that was particularly shaped by their gender and caste.<sup>209</sup>

Part IV's examples also hold lessons for how unions organize themselves. Many labor unions strive for diversity in their leadership, especially racial and gender diversity.<sup>210</sup> However, as unions in many sectors become less white, other forms of discrimination should also be accounted for, including caste. In a union with a high percentage of the rank-and-file being of South Asian descent, as could occur in a large IT union, ensuring caste diversity becomes an

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<sup>208</sup> There is reason to hope this will become more likely over time as educational institutions continue to offer classes which teach about intersectionality and its impact on thinking about discrimination. Increasing training around caste discrimination has been an aim of Equality Labs, see *Impact*, EQUALITY LABS, <https://www.equalitylabs.org/about/impact/> (accessed Jan. 12 2025) (“Through our training, mentorship, and support, caste-oppressed civil rights leaders across the nation are fighting for their rights, making their institutions more inclusive, and strengthening American democracy.”). I thank the editors at AALJ for this suggestion.

<sup>209</sup> Tiku, *supra* note 100; *Caste Survey*, *supra* note 11, at 26–27. In a more extreme circumstance, this intersection between sex and caste was the case underlying the 1997 decision in *Visaka*, which involved the gang rape of an oppressed caste woman (though the incident itself is described in only two sentences). See *Vishaka and Others v. State of Rajasthan and Others*, LNIND 1997 SC 1081, para. 2. (“The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of social worker in a village of Rajasthan. That incident is the subject matter of a separate criminal action *and no further mention of it, by us, is necessary.*”) (emphasis added). As Baudh notes, this all too short description of the gang rape completely elides its intersectional nature that directly touches on the impact caste has to the safety of a woman worker. Baudh *supra* note 72, at 133.

<sup>210</sup> Wang, *supra* note 108.

especially pressing issue. As seen above with the experiences of unions in Indian tea plantations, the union leadership were often from dominant castes, resulting in out-of-touch leaders who did not effectively serve workers.<sup>211</sup> Besides the leadership being out of touch, this can also cause oppressed caste members to feel alienated from the union, reducing their participation and generally weakening the vitality of the union.<sup>212</sup> The experience of caste in Indian labor organizing underlines the tactical importance of labor unions continually striving to achieve a form of self-governance that represents all workers in their various intersecting identities.

From the perspective of a manager, caste diversity is also an important step to achieving labor peace, as shown in the case of Toyota's main plant in India.<sup>213</sup> While Toyota's mostly Japanese caste managers believed they were implementing a cutting-edge type of plant management now known as "Toyotism", it sounded all too much like traditional Brahminism to the mostly oppressed caste workers.<sup>214</sup> This miscommunication resulted in violent industrial action at both Toyota plants in India. Toyotism by Japanese management required "performance," "perfection," and "renunciation."<sup>215</sup> This came across as plain old Brahminism to oppressed caste workers. Toyotism's approach of lean production made things worse as lean production emphasized greater employee investment in the company and its culture, a model

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<sup>211</sup> JAYASEELAN RAJ, *PLANTATION CRISIS: RUPTURES OF DALIT LIFE IN THE INDIAN TEA BELT*. UCL Press, 2022. <https://doi.org/10.14324/111.9781800082274> at 41. ("The union leaders in Kerala were not plantation workers. *The union leadership was primarily made up of career politicians from non-Dalit Malayalam-speaking* [. . .] Most of the workers addressed the union leaders as 'sir' (a widely used denotation to address someone of higher authority, in this context, in the plantation). *A few workers, usually technical workers and supervisors associated with the left-wing trade unions, called them Sakhāvu (which in Malayalam means 'comrades').*") (emphasis added).

<sup>212</sup> *Id.* (example with organizing on tea plantations).

<sup>213</sup> See generally Saji Mathew & Robert Jones, *Toyotism and Brahminism: Employee Relations Difficulties in Establishing Lean Manufacturing in India*, 35(2) EMP. REL. 200, 221 (2012); see also David Pollitt, *Toyota Falls Foul of Caste System: Industrial Unrest Linked to Class Antipathy*, 22(7) HUMAN RESOURCE MANAGEMENT INTERNATIONAL DIGEST (Oct. 13, 2014), 5, 7. <https://doi.org/10.1108/HRMID-10-2014-0132>. (distillation of the events covered by Mathew and Jones).

<sup>214</sup> Mathew & Jones, *supra* note 213, at 212–14.

<sup>215</sup> *Id.*

which may fit in the work culture of East Asian nations such as Japan and South Korea but was very poorly received in India.<sup>216</sup> Toyotism's emphasis on exact procedure and intensive development of routine also clashed with work styles popular among Indian workers, especially those of oppressed caste. The idea of *jugaad*, the improvised and shortened versions of any type of procedure and that one should not dogmatically insist on one method, found no truck among Toyota's managers.<sup>217</sup> Caste diversity in both worker representation and management might have mitigated these costly culture clashes, and arbitration is one way in which these clashes could have been settled without the expense and tension of a court battle.

### **VLD Which Way: Arbitration Awards or Judicial Precedents?**

It might be argued that this approach to arbitration could be in tension with the desire to enshrine caste discrimination in Title VII jurisprudence. If arbitration is entitled to so much deference and respect, so the argument goes, and a collective bargaining agreement can even include enforceable waivers of an ability to pursue discrimination claims through the courts,<sup>218</sup> might this hinder the ability for appropriate test cases to reach the judiciary?<sup>219</sup> Not necessarily.

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<sup>216</sup> *Id.* at 16.

<sup>217</sup> *Id.* at 14.

<sup>218</sup> The case *14 Penn Plaza v. Pyett* is particularly important here, not so much due to its specific facts—the enforceability of a provision waiving a worker's right to pursue a discrimination claim outside of arbitration, a provision few unions would choose—but because of its impact on later appeals courts. 556 U.S. 247 (2009). Appeals courts and prominent district courts such as the Fifth Circuit in 2014 (*Gilbert v. Donahoe*, 751 F.3d 303 (5th Cir. 2014)), the First Circuit in 2017 (*Prime Healthcare Services-Landmark, LLC v. United Nurses & Allied Professionals Local 5067*, 848 F.3d 41 (1st Cir. 2017)), and the South District of New York in 2017 (*Abel v. All Green Building Services of New York LLC*, 2017 BL 407902 (S.D.N.Y. Nov. 14, 2017)), have continued to rule various issues arbitrable including pension plans and religious discrimination, all relying on the logic of *14 Penn Plaza*.

<sup>219</sup> This is essentially the argument of Richard Alderman. See Richard Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003) (“Arbitration eliminates litigation in a public forum, precedent establishing decisions, and *stare decisis*.”); see also The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Const. of S. Comm. on the Judiciary, 110th Cong. (2007) (statement of Richard M. Alderman, Director, Center for Consumer Law, University of Houston Law Center), <https://www.judiciary.senate.gov/imo/media/doc/Alderman%20Testimony%20121207.pdf>; [<https://perma.cc/TK9A-5R5J>] (stating that arbitration will “essentially freez[e] the common law of consumer transactions, denying courts the ability to develop and adapt the law”); but see Christopher R. Drahozal, *Arbitration and Rule Production*, 72 (1)

While the Supreme Court’s 2009 holding in *14 Penn Plaza* allowed for people to waive their right to pursue a discrimination claim in federal court, the Court has also held in *Alexander v. Gardner-Denver Co.* that an employee’s right to a de novo standard of review for a discrimination claim is not barred by prior submission to a final and binding arbitration arising under a CBA.<sup>220</sup> In a particularly influential footnote in *Gardner*, the Court lays out when lower courts may defer to arbitration around Title VII claims:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court’s discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight.<sup>221</sup>

The famous “Footnote 21” provides a number of criteria for when an arbitration decision carries weight.<sup>222</sup> Notice that the facts include fairness of the forum, adequacy of the record, and “special competence of particular arbitrators.”<sup>223</sup> This is where the common law of the shop can prove most valuable as an arbitrator with long-term contact with a union-employer relationship can cultivate greater knowledge of how discrimination and other grievances may operate in that setting. In the case of caste discrimination in the tech industry, arbitrators could develop expertise around caste in the employment environment, providing reasoned awards that are able to deftly draw on the record and past practice of how caste has appeared in the tech sector.

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CASE W. RES. L. REV. 91, 92–93 (2023) (critically analyzing Alderman’s and others’ hypotheses of how arbitration hinders judicial rule making).

<sup>220</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 36. Justice Thomas’ opinion for the Court in *14 Penn Plaza* did criticize *Alexander v. Gardner-Denver* on multiple grounds, but it does not formally overrule it, and the Court expressly disagreed with the claim in Justice Souter’s dissent that *Gardner-Denver* had been overturned. *Penn Plaza v. Pyett*, 556 U.S. at 263.

<sup>221</sup> *Id.* at 60 n.21. (emphasis added).

<sup>222</sup> See also ELKOURI & ELKOURI, *supra* note 188 at 70.

<sup>223</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 60 n.21.

The agreement at issue in *14 Penn Plaza* represents the furthest reach of arbitration power—one that most unions would not choose to take.<sup>224</sup> What may happen more often, as seen in *Alexander* and related cases,<sup>225</sup> is that a collective bargaining agreement includes robust arbitration procedures for various issues (including those of discrimination), but it will lack a clear and unmistakable waiver of the employee’s rights to sue under a statute. Even if an arbitrator provides an adverse ruling to an employee seeking a caste discrimination claim under a CBA provision guaranteeing Title VII abidance, that employee can still pursue the claim in federal court and receive a second shot.

Nevertheless, there is justifiable hesitancy around arbitration and the vindication of rights for underprivileged workers.<sup>226</sup> After all, the last three decades have seen a veritable explosion of pre-dispute mandatory arbitration clauses in an employment context,<sup>227</sup> going from only 2% of workers being covered by mandatory arbitration clauses in 1991 to over 56% by 2024.<sup>228</sup> This has especially been true with regard to mandatory arbitration over sexual harassment and sexual assault. In 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and

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<sup>224</sup> *Supra* note 218.

<sup>225</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. at 43 (noting African-American steelworker’s claim of racial discrimination was “submitted to the arbitrator and resolved adversely to petitioner.”) (case’s dicta that was critical of arbitration partially overruled by *14 Penn Plaza* with); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 24 WH Cases 1284 (1981) (arbitration award under collective bargaining contract claim does not prevent later suing under Fair Labor Standards Act); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984) (§ 1983 claims are not waived by arbitration of collective bargaining contract claim based on same facts); *see also* ELKOURI & ELKOURI, *supra* note 188, at 68 n.279.

<sup>226</sup> For helpful reflections on the impact of arbitration on civil litigation, see Richard Freer, *Exodus from and Transformation of American Civil Litigation*, 65 (6) *Emory L. J.* 1491-1496 (Jan. 1, 2016); *see also* Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages - Where Is the State Action?*, 2007 (2) *J. DISP. RESOL.* 417, 417 (2007), <https://heinonline.org/HOL/P?h=hein.journals/jdisres2007&i=421>.

<sup>227</sup> Ariana R. Levinson, “Expanding the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act to Protect Workers’ Rights.” SSRN Scholarly Paper. (last updated June 20, 2023) <https://papers.ssrn.com/abstract=4486077> at 3 (*forthcoming in* THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM, (Richard Bales & Jill Gross eds., 2024)).

<sup>228</sup> Katherine V.W. Stone, *Arbitration -- From Sacred Cow to Golden Calf: Three Phases in the History of the Federal Arbitration Act*, 73 *LAB. L. J.* 66, 66 (2022) (arbitration rates in the 1990s); Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 *CHI-KENT L. REV.* 3, 20 (2019) (arbitration contract rates by the end of the 2010s).

Sexual Harassment Act (EFASAHA) into law. This legislation amended the Federal Arbitration Act to make forced arbitration clauses in cases of sexual offenses unenforceable.<sup>229</sup> Importantly, the EFASAHA explicitly says that only a judge, not an arbitrator, may determine the enforceability of existing clauses related to arbitration of sexual offenses.<sup>230</sup> Even more ambitious attempts have been made, such as the Forced Arbitration Injustice Repeal (FAIR) Act, which was first introduced in 2019 and generally banned forced arbitration over any type of employment dispute.<sup>231</sup> While the FAIR Act has so far been unsuccessful in Congress, it did pass the House of Representatives under a Democratic Party majority in March 2022.<sup>232</sup> There have been other, more moderate bills such as the Arbitration Fairness Act, which was introduced in each Congress between 2007 and 2017, that banned mandatory pre-dispute arbitration clauses covering civil rights abuses.<sup>233</sup>

The desire to ban mandatory pre-dispute arbitration clauses is well founded, as they have indeed undermined workers' rights in a variety of ways.<sup>234</sup> However, this Article does not endorse CBAs including clauses like mandatory pre-dispute arbitration clauses, especially those

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<sup>229</sup> 9 U.S.C. §§ 401–402, especially § 402(a): (“Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, *no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute*”) (emphasis added); See also Department of Defense Appropriations Act for Fiscal Year 2010 § 8116, Pub. L. No. 111–18, 123 Stat. 3409. (“The Franken Amendment”) (banned Department of Defense contracts over \$1 million that contained mandatory arbitration of sexual assault and harassment cases).

<sup>230</sup> 9 U.S.C. § 402(b) (“The applicability of this chapter [9 USCS §§ 401 et seq.] to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter [9 USCS §§ 401 et seq.] applies shall be determined by a court, *rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement*, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.”) (emphasis added).

<sup>231</sup> H.R. 1423, 116th Cong. (2019); S. 610, 116th Cong. (2019); H.R. 963, 117th Cong. (as passed by House, Mar. 17, 2022); H.R. 2953, 118th Cong. (2023).

<sup>232</sup> H.R. 963, 117th Cong. (as passed by House, Mar. 17, 2022).

<sup>233</sup> H.R. 1374, 115th Cong. (2017).

<sup>234</sup> Jean Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1354 (2015).

that specifically cut off an employee's access to judicial remedies under Title VII. The *14 Penn Plaza* decision by the Supreme Court dealt with an arbitration clause so strong that few unions would willingly pick such a provision. Instead, there are weaker forms of arbitration that still allow workers to pursue discrimination claims de novo in courts.

Besides the argument that CBA arbitration agreements do not have to cut off judicial remedies, there is another difference: an arbitration clause restricting a worker's access to the courts is so odious in cases of sexual assault and harassment because there already exists a robust judicial and legislative framework on these topics which the worker may leverage to achieve justice. In contrast, there is virtually no jurisprudence on caste, and there is no precedent establishing whether Title VII includes caste. Arbitration over sexual harassment and assault can keep a worker from more powerful avenues, but with caste, arbitration is the only readily available legal avenue for recourse

The above point raises another comparison between India and the United States. Labor arbitration over caste in India sits in a similar place to labor arbitration over sex discrimination in the United States. In both cases, arbitration might be seen as ineffective compared to judicial remedies and ultimately serves as a self-serving roadblock to a worker achieving justice. India's relative paucity in caste-related labor arbitration can thus be seen as a desirable result emerging from real legislative and constitutional victories. It is to be hoped that, with the continued application of the EFASAA Act, the field of sexual assault and harassment arbitration will become just as arid.

This Article still grants the critic's point that arbitration over caste can lead to unjust decisions. This article also grants the more general normative point that, abuses of civil rights should ideally be handled in public courts of law. However, this Article is mainly focused on

finding serviceable, medium-term paths for oppressed caste workers to achieve some modicum of justice against their employer in light of a conservative federal judiciary that is loath to expand civil rights protections. Thus, while both caste and sex discrimination are common ways in which South Asian workers are dehumanized in their own workplace, arbitration can be an effective legal route for addressing caste discrimination, whereas it is ineffective for addressing sexual discrimination.

### **V.I.E Absolute Monarchs in Petty Kingdoms: Is Labor Arbitration Lawless?**

A fundamental objection to the arbitration-heavy approach to establish protections against caste discrimination is the tension between seeking arbitration and vindicating rights in court. It has long been argued that arbitration's speediness and informality can give rise to a "lawlessness"<sup>235</sup> whereby arbitrators feel little obligation to pay attention to statutory law in their interpretation of the CBA.<sup>236</sup> This potential lawlessness is possibly exacerbated by some of the very same decisions provided above to demonstrate judicial deference to arbitrators.<sup>237</sup> Rogue arbitrators, no longer bound to due process obligations like judges,<sup>238</sup> can lead to unjust outcomes that trample over the already-disrespected rights of minority workers, including those of oppressed caste. Indeed, the overweening authority of arbitrators can have catastrophic results for the whole legal order. As Heinrich Kronstein, an early articulator of this view, put it:

Arbitration is power, and courts are forbidden to look behind it. [. . .] It is not possible to maintain any legally established policy [. . .] if courts abdicate their

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<sup>235</sup> For an early articulation of this view, see Heinrich Kronstein, *Business Arbitration-Instrument of Private Government*, 54 YALE L. J. 36, 66 (1944) ("No theory in support of organized arbitration can conceal the essential 'lawlessness' of this form of 'private government.'").

<sup>236</sup> Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L. A. REV. 187 (2006).

<sup>237</sup> E.g., *Roadmaster Corp. v. Laborers Loc. 504*, 851 F.2d 886, 888 (7th Cir. 1988); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

<sup>238</sup> See Charles Smith, *The Application of Due Process to Arbitration Awards of Punitive Damages - Where Is the State Action?*, 2007 J. DISP. RESOL. 417, 417 (2007); PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION*, 145-56 (2013).

power in favor of private tribunals serving private interests. American courts are presently confronted with a conflict with such private courts. In the face of the current trends in our society, the central concept of a social regime whose exclusive ordering is the totality of legislative and judicial mandates, has been weakened by the cession of segments of the law to organized arbitration.<sup>239</sup>

Might the solution offered in this Article—specifically, urging arbitrators to interpret antidiscrimination sections of CBAs that substantially reproduce Title VII protections as also protecting against caste discrimination, considering caste discrimination as a multidimensional discrimination based on ancestry and religion—lead to an increase in this sort of “lawlessness?”

It is not entirely clear whether arbitrators even act lawlessly. There have been several empirical studies of how much arbitration awards rely on statutory law in their reasoning. Many of them have been inconclusive as to whether arbitration awards usually cite statutory law for their awards,<sup>240</sup> though others have suggested a minority of arbitrators expressly rely on statutory law and other external authority.<sup>241</sup> Even if only a minority of arbitrators use statutory law in the awards, this Article’s offered solution is for arbitrators to interpret Title VII as including caste discrimination protections and to apply this in the context of CBA antidiscrimination provisions.<sup>242</sup> While arbitrators may not cite statutory law as much as they should, this solution does not present any unique disadvantages. Arbitrators, by interpreting Title VII to ban caste discrimination and interpreting CBA anti-discrimination agreements as substantially replicating Title VII in the CBA, can in effect have the best of both worlds. Through their interpretation of

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<sup>239</sup> Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661, 699–700 (1963).

<sup>240</sup> Drahozal, *supra* note 235, at 194 (2006) (“The empirical evidence on this point—which consists of case analyses, surveys of arbitrators, and reversal rates of arbitration awards and court decisions—is varied but ultimately inconclusive.”).

<sup>241</sup> *Contrast id. with* Ariana R. Levinson, Erin O'Hara O'Connor, & Paige Marta Skiba, *Predictability of Arbitrators' Reliance on External Authority?*, 69 AM. U. L. REV. 1827, 1881 (2020) (arguing labor arbitrators, in particular, do not cite statutory law in most cases).

<sup>242</sup> In essence trying to apply the interpretation found in *Title VII and Caste*, *supra* note 21, *passim*.

Title VII, the arbitrators demonstrate an appropriate reliance on statutory law. However, the flexibility of arbitration enables them to understand caste discrimination as it occurs in each workplace, as arbitrators are not bound by restrictive judicial framework for determining discrimination. Arbitrators may express interpretations of Title VII that do not have extant judicial precedent but getting ahead of public courts on what a public law means is not the same as defying public courts on a public law. Considering likely continued judicial reluctance around caste and the ongoing discrimination oppressed caste workers face, there is wisdom in using an imperfect but efficient means of justice like labor arbitration.

#### **VI.F A Potential Pitfall for Unionized Caste-Affected Workers: *Emporium Capwell***

The above shows how unionized workers can leverage the unique deference afforded to labor arbitration to introduce caste discrimination protections into the workplace. Yet, there are well-founded concerns about the growth of arbitration as a form of private justice that destabilizes the liberal democratic rule of law, a worry well-articulated by Heinrich Kronstein.<sup>243</sup>

There is an additional worry: the union itself may become a roadblock to the employee's pursuit of justice. The main case on this is the Supreme Court case *Emporium Capwell Co. v. W. Addition Cmty. Org.*<sup>244</sup> This case concerns a group of Black workers in a union who were the victims of racial discrimination in the workplace.<sup>245</sup> However, the method established under the collective bargaining agreement was slow, and the workers began picketing to force the company to address the discrimination.<sup>246</sup> They were discharged, and the Court upheld the discharge, ruling that the concerted activities of these Black workers were not protected under Title VII nor

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<sup>243</sup> Heinrich Kronstein, *supra* note 234.

<sup>244</sup> *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

<sup>245</sup> *Id.* at 51-53.

<sup>246</sup> *Id.*

the National Labor Relations Act (NLRA).<sup>247</sup> The Court emphasized the importance of maintaining the form of collective bargaining between union and employer.<sup>248</sup>

This is where the lesson of the tea plantations become most relevant. American labor law following *Emporium Capwell* emphasizes that union governance and structure must be based on majoritarian rule. In many ways, this focus on democratic governance can be seen as a good outcome. However, this majoritarian approach can also prove harmful to minority workers. If a worker faces discrimination that most other workers in a union do not face, there is a strong possibility (as in *Emporium*) that the union does not adequately pursue redress for that form of discrimination. This danger is especially present if the union's leadership, especially the union's grievance committee, is unfamiliar with that form of discrimination.

American law does not primarily see a collective bargaining agreement as a democratic declaration of workers pursuing mutual protection. Instead, the Supreme Court likens them to a type of trade contract.<sup>249</sup> In *J. I. Case*, the employer in an NLRA-recognized collective bargaining agreement has agreed to hire workers on terms that are set exclusively between the union and the employer.<sup>250</sup> This is a "trade contract" in that the employer is agreeing to "trade" with the union on certain terms over the union members' labor power.<sup>251</sup> This is not to say a worker of oppressed caste would have no recourse whatsoever against an incalcitrant or ineffective union that is uninterested in caste discrimination. The workers could sue the union for failing in their duty of fair representation under section 9 of the NLRA. This was in fact the route Justice Douglas offered in his dissent as an alternative to the workers involved in *Emporium*

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 70.

<sup>249</sup> *J. I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

*Capwell*. In his dissent, Douglas cites the Court's opinion in *New Negro Alliance v. Sanitary Grocery Co.* that the desire for racial and religious equality in the workplace "is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association."<sup>252</sup> Past cases once attempted to find a compromise solution where an employee's self-help against discrimination might be protected activity under the NLRA, as long as the employee's self-help does not contradict the union's own position. The Fifth Circuit case *NLRB v. R.C. Can Co.* is the most prominent example of this approach, wherein the court reversed the termination of employees who briefly picketed during a negotiation impasse between employer and union despite not being officially authorized by the union.<sup>253</sup> However, *R.C. Can* appears to be tacitly overruled by *Emporium Capwell*'s holding. As Justice Jackson first admitted in *J. I. Case*, "An employee becomes [ . . . ] a third party beneficiary to all benefits of the collective trade agreement, even if

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<sup>252</sup> *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. at 74–75 (J. Douglas dissenting) (quoting *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938)) ("The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association.").

<sup>253</sup> *NLRB v. R.C. Can Co.*, 328 F.2d 974, 979 (5th Cir. 1964) ("If, on the other hand, [the picketing] seeks to generate support for and an acceptance of the demands put forth by the union, it is protected so long, of course, as the means used do not involve a disagreement with, repudiation back to work as soon as production requirements taken by the union such as, for example, a no strike pledge, a cooling off period, or the like during negotiation."); accord *NLRB v. Rubber Rolls, Inc.*, 388 F.2d 71, 73 (3d Cir. 1967) ("There enters into this also the realization that there is a practical advantage to a bargaining agent in extreme demands by individual employees which may aid its more moderate position, and a distinction has been drawn by some authorities between conduct of an employee which is in antagonism rather than in aid of the bargaining agent's negotiation."); accord *W. Addition Cmty. Org. v. NLRB*, 485 F.2d 917, 930 (D.C. Cir. 1973), *rev'd*, *Emporium Capwell Co. v. W. Addition Cmty. Org.*, *vacated*, *W. Addition Cmty. Org. v. NLRB*, 512 F.2d 992 (D.C. Cir. 1975) (citing *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963)) ("[It is] significant that the Union and the [workers] were *not* working at cross-purposes, but were both attempting to eradicate racially discriminatory employment. There was no disruption of orderly collective bargaining in the sense that minority of employees were not attempting here to speak for the majority as in the case where a minority group engages in a 'wildcat' strike during company-union negotiations in an attempt to express a rejection of a company offer.") (emphasis in original). The approach embodied by all these cases was ended by *Emporium Capwell*.

on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement [. . .].”<sup>254</sup>

Thus, India and the United States also present contrasting legal pictures of unions as bargaining units. While India’s labor law struggles to provide unions with the ability to force exclusive bargaining,<sup>255</sup> the United States’ labor law arguably emphasizes exclusivity so much it can lead to minority workers being underserved in their pursuit of justice. In both cases, caste oppression can subsist. However, if adjusting national jurisprudence around caste seems challenging, altering statutory labor law (especially section 9 of the NLRA) seems even more remote. This makes arbitration, given its explicit preference as a matter of public policy and its extraordinarily deferential treatment by the courts, an especially valuable route for unions in the short and medium term.

As mentioned above, caste discrimination is often based on mutable characteristics such as diet, name, and language.<sup>256</sup> Current American jurisprudence has also struggled to recognize how discrimination can be based on these characteristics.<sup>257</sup> This difficulty is compounded by further particulars of caste such as *jati*-s. While a person’s *jati* stays relatively stable, the hierarchy between *jati*-s is highly fluid.<sup>258</sup> Two members of the same *varna* may have very different *jati*, and this disparity in *jati* could be the vector by which the caste discrimination occurs.<sup>259</sup> Indeed, most marriages occur within the same *jati*, not just the same broader *varna*.<sup>260</sup>

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<sup>254</sup> J. I. Case Co., 321 U.S. at 335.

<sup>255</sup> *Id.* at 335–36.

<sup>256</sup> Nitasha Tiku, *India’s Engineers Have Thrived in Silicon Valley. So Has Its Caste System.*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/>.

<sup>257</sup> *Supra* Section V.A.

<sup>258</sup> Joshi et al., *supra* note 46, at 1.

<sup>259</sup> *Id.* at 1–2.

<sup>260</sup> *Id.* (“Some non-government surveys have gathered some *jati*-level identifiers. These data confirm the importance of *jati* identity in modern India. Most marriages are contracted within *jatis*”).

It bears noting that, while American law seems woefully unequipped to grapple with this dimension of caste, Indian law is not much better. As noted by Shareen Joshi, Nishtha Kochhar, and Vijayendra Rao, this is a major hole in Indian law's framework around "Scheduled Classes,"<sup>261</sup> and much of the inequity between castes is a function of the inequities between *jati*-s.<sup>262</sup> Like *varna*, there is an intersectional component to discrimination based on *jati*, with the relative dominance or oppression a particular *jati* faces having a major impact on the ability of women's access to markets and social life.<sup>263</sup> However, arbitrators do not need to be so hidebound in their understanding of discrimination. The grievant could describe their *jati*-based discrimination as a function of caste discrimination to the arbitrator. If caste is understood as a nexus of *varna* and *jati*, then a CBA's anti-discrimination article protecting against caste could protect against discrimination based on either *varna* or *jati*, regardless of whether the vector of discrimination is a mutable property.

How might an arbitrator be able to realize caste protections from a CBA anti-discrimination provision if it is not included as a protected identity? St. Antoine's treatise *Common Law of the Workplace* defines "past practice" as "a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action."<sup>264</sup> Another prominent definition is that "past practice" refers to "[a] custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 2.

<sup>263</sup> *Id.*

<sup>264</sup> THE COMMON LAW OF THE WORKPLACE 89 (Theodore St. Antoine ed., 2005).

characteristically repeated in response to the given set of underlying circumstances.”<sup>265</sup> The *Steelworkers Trilogy* becomes newly relevant here. The unique level of deference labor arbitrators enjoy also extends to relieving the arbitrator of certain common law restrictions on determining the meaning of a CBA provision. In particular, the arbitrator does not have to obey the parol evidence rule,<sup>266</sup> so they may look out broadly at whether the actions of both the company and union in determining how caste-related discrimination is treated.<sup>267</sup> If, for instance, a multinational company has long taken steps to end caste discrimination through company policy in one country, might those actions bear any weight to an arbitrator in the United States determining the company’s past practice over caste? While there are slight differences between the two definitions above, both define the “past practice” that constitutes the common law of the shop in terms of similar reactions to a recurring sort of situation over time. That “type” of situation has to have certain essential facts that recur, but does one of those recurring facts have to be that all the same parties are involved in each instance? If not, then it may be possible to look at the company’s actions in circumstances that are similar except for the identity of the union. The Alphabet union highlights that Alphabet protects against caste discrimination in India.<sup>268</sup> This might serve as evidence that Alphabet’s past practice has been to combat caste discrimination against its workers.

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<sup>265</sup> Grievance No. NL-453, Docket No. N-146, Jan. 31, 1953, Reported at 2 *Steelworkers Arbitration Bull.* 1187; *See also* other influential early articulation in an arbitration with the Celanese Corporation: “Practice must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties.” *Celanese Corp of Am.*, 124 LA 168, 172 (Justin, 1954).

<sup>266</sup> *Supra* note 263, at §§ 1.88 and 2.5; *see also* *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968) (providing classic statement of this release from parol evidence rule for arbitrators).

<sup>267</sup> *Supra* note 263.

<sup>268</sup> ALPHABET WORKERS UNION, *supra* note 2.

Indeed, arbitration at the largest tech companies and most influential universities could be especially impactful for establishing caste as being covered by the industrial common law. Remember Douglas' article in *Steelworkers v. Enterprise Wheel and Car*, that “the labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law — *the practices of the industry and the shop* — is equally a part of the collective bargaining agreement although not expressed in it.”<sup>269</sup> While the facts of a particular dispute may involve only the shop, the arbitrator can readily refer to the industry for resolving the dispute. Alphabet and other multinational corporations pose interesting questions because they are both industry leaders and truly large shops.

## **VII. Conclusion**

When thinking about caste discrimination in the workplace, multiple tracks must be taken. A statute explicitly listing caste as protected will provide the most visible safeguard, but this can face harsh opposition. Some jurisdictions have demonstrated their understanding of the reality of caste oppression, but it is slow work. Given the current composition of the Supreme C, it may even be to the benefit of South Asian workers and activists that no test case is on the horizon. Arbitrators can provide another method with some promise, but they are far from a perfect solution. This Article has been written in the face of recent legislative defeats in both the United States and the United Kingdom to properly enshrine a ban on caste discrimination, and this Article proceeded with the goal to consider the experience of oppressed caste workers in both India and the United States to ascertain the promises of labor arbitration as a medium-term

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<sup>269</sup> *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. at 581–82 (1960) (emphasis added).

solution. I hope that these considerations are of some tactical value to labor organizers and those committed to caste equality going forward.